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ON TEACHING INTERNATIONAL LAW

THE purpose of this paper is to initiate a debate. In the United States, the American Society of International Law regularly devotes sessions to the discussion of problems connected with the teaching of international law. In the United Kingdom, the Society of Public Teachers of Law has a natural tendency to concentrate on subjects that, for the great majority of its members, can claim greater urgency.[1] Thus, it may be timely to re-examine the issues of principle in the light of present-day needs. The subject divides itself naturally into the questions which arise on the undergraduate and postgraduate levels of university teaching in international law.

I. *Undergraduate Teaching.*

Attention may be concentrated on three central questions: the scope of the subject; the presentation and selection of the material; and, finally, examination questions.

(a) *Scope of the Subject.* In any laws course, the emphasis must necessarily lie on the analytical treatment of the subject. The only question is whether, and if so, how far such a course should venture into the other two fields of legal science: the sociological interpretation of the branch of law concerned and law reform.

The simplest solution would be to exclude both these topics on the ground that they are not the lawyer's concern. Admittedly, the sociology of law requires methods different from those which the lawyer applies in his analytical and systematic work. Yet if this

[1] Since this paper went to press, the Society of Public Teachers of Law announced the welcome news that, at the Society's Annual Meeting in September next, Sir Arnold McNair will read a paper on *The Wider Teaching of International Law.*

task were left exclusively to the sociologist, he, too, would in all probability ask to be excused from the performance of this task and plead his lack of a technical legal training. In effect, such a mutually self-denying attitude would probably mean that neither side would undertake work in this field. In case of doubt, the lawyer should not shirk it; for unless he sees his own legal system in its proper social perspective, he is likely to present it out of focus and, thus, to be himself the chief sufferer from his own timidity. Owing to the limitations and peculiarities of international law as an extreme type of the law of power this danger is greater in the case of international law than with any branch of municipal law.

It has also been held that problems of law reform are political and not capable of scientific treatment. If the relativist method of presenting all the possible patterns of law reform is applied, and each of these is subjected to detached analysis both regarding its basic assumptions and its technical execution, then this objection, too, falls to the ground.

It is always possible to argue that limitation of time militates decisively against the inclusion of both these topics in undergraduate courses. Moreover, it is a tenable proposition that these subjects are more suitable for inclusion in postgraduate courses; for, before attempting to interpret a branch of law in its social context or concerning himself with its reform, the student should first learn to master his subject.

If topics are important, lack of time should never be a decisive reason for excluding them from two or three weekly lectures. The real questions are whether the sociology and reform of international law are of sufficient importance to justify a corresponding curtailment of other topics, and whether it is wise to burden undergraduates with them.

The short answer to the first question is that it is hard to see how it is possible to treat international law intelligibly without an adequate sociological foundation. Only against the background of international society can questions such as consent as the basis of international arbitration, duress against States not forming a ground for the invalidity of an international treaty, or the veto of the permanent members in the Security Council fall naturally in their place. Without it, international law must appear to the student as a lifeless and quaint phenomenon. Whatever wisdom there may be in the postponement of such questions until the postgraduate stage, undergraduates happen to be highly interested in these questions. Is it preferable then, that they should seek their answers without proper guidance? The same applies to questions of the reform of international law. The shortcomings of international law are such that

students cannot help wondering about the wider issues of international order. They do not live in a social vacuum. The alternative would be to leave them to fend for themselves and to fail to provide them with the scientific equipment with which to dissect the multitude of benevolent schemes for the improvement of world order that are poured out by the dozen.

Even if the sociology of international law and questions of its reform are included in undergraduate courses in international law, only limited time is available for these subjects. The chief problem is the best presentation of the main body of the material.

(b) *System and Teaching Material.* The traditional division of international law into the laws of peace, war and neutrality suffers from an unrealistically sharp distinction between the states of peace and war in international customary law. It obscures the *status mixtus*, which is characterised by compulsory measures short of war, and overweighs the subject on the side of the laws of war and neutrality.

A radical remedy would be to eliminate the teaching of the laws of war and neutrality altogether at least on the undergraduate level. This proposition might be justified on two opposite grounds. It might be argued that, in the atomic age and in a phase of world wars, much of these branches of international law is merely of historical interest. It might also be held that, in the era of the United Nations and of the Judgments of Nuremberg and Tokyo, these subjects have become obsolete.

As a matter of fact both arguments suffer from fallacious overstatements. While in the field of air warfare hardly any guiding legal principles exist, it need not be taken for granted that, in any future war, all rules of warfare will be ignored, nor that no State will be in a position to maintain its neutrality. Conversely, the phenomenon of aggression by proxy, the inability of the Security Council to act in the face of a veto by one of the permanent members, and the hesitation of the General Assembly of the United Nations to put the Acheson Security Plan into operation in the Korean War suggest that our brave new world is not so different from that of the bad old days that we may rule out completely the possibility of war or treat it as a merely criminal aberration. Even if this assumption were justified, the war criminals of Nuremberg and Tokyo were not only condemned for crimes against peace and humanity, but also for the commission of war crimes in the technical sense. To know whether an act of war is a war crime it is necessary to determine first the rules of war.

Should not these subjects be reserved for postgraduate studies? Against this, the great didactic value of the laws of war and

neutrality may be pleaded. They are ideal to demonstrate both the forces that have moulded existing international law and its limitations in a system of power politics.

A strong case can be made for limiting the presentation of the laws of war and neutrality to the absolute essentials. This makes it possible to put the chief emphasis on the law of peace and on those parts of it which are both of the greatest practical importance and are least affected by the vortex of world politics. Thus, for some years, in the University of London, the subject has been divided into General Principles, comprising the Foundations of International Law; International Personality; State Jurisdiction; Objects of International Law; International Transactions, and War and Neutrality, and into two optional Special Subjects: the Law of International Institutions and International Economic Law. The General Principles form the subject of the lectures during the Autumn and Spring Terms, and the Summer Term is left free for the optional Special Subjects.

Whichever system is adopted, the most difficult problem is the choice of the material for the illustration of the principles of international law. Much is to be said for giving pride of place to the decisions of international courts and tribunals, especially those of the World Court. Compared with the decisions of other international judicial institutions and those of national courts, the practice of individual States and the doctrine of international law, the World Court may claim primacy on three grounds; a relatively higher degree of independence, of international outlook and of technical accomplishment. Moreover, by focusing attention on the judgments and advisory opinions of the World Court, it is possible to drive home both the reality and the, at least relative, certainty of international law.

In so far as this material has to be supplemented—and, in view of the fragmentary character of internationally decided cases, this need exists—the choice will depend on the type of student. In the case of laws students, the second best appears to be decisions of national courts. It is debatable whether these should be selected from the practice of any country in which courts have rendered relevant decisions or whether preference should be given to the judgments of British and other Anglo-Saxon courts. The latter course has much to commend itself. Decisions of national courts are best understood against the background of the legal system in which they originate. Laws students in English universities are likely to be more familiar with the legal terminology employed in their own country than with that of foreign courts and they can assess more easily the significance of any particular judgment in the hierarchy of their own

judiciary. More important, they will be able to discern more easily than in the case of a foreign judgment the constitutional limitations which may prevent a court from dealing with otherwise relevant aspects of any particular case or may even preclude it from taking into account a pertinent principle of international customary law or a treaty in the field. Last, but certainly not least, the full texts of the judgments of the courts of their own country are at the student's elbows. The same is not always true of those of foreign courts, and, unavoidably, the best digest of any foreign judgment is only a poor substitute.

With students of History and of International Relations, the second choice might well be in favour of State practice. In view of the sad state in which, with the notable exception of the United States, the systematic study of State practice still is, it would be somewhat unscientific to use without the greatest caution diplomatic notes from all over the world. Too often the teacher himself would not be sure that such an illustration was typical of at least the practice of any particular State. For the time being, this problem is largely unsolved even in so far as British practice is concerned.

Last, there is the Doctrine of International Law. In so far as it illustrates the work of international and national courts and State practice, is serves as a necessary guide to the sources. The more speculative type of literature may, however, well be left with students of Jurisprudence or reserved for postgraduate studies.

To judge by the experience in the University of London, there is one way of supplementing the basic undergraduate course which is bound to stimulate the interest of students. This is a course on Current Problems of International Law, with plenty of opportunities for students themselves to propose the topics which they would like to see treated. Here students can see international law in the making and, by taking an active part in the analysis of the most controversial subjects from every possible point of view, train themselves in the art of detachment from preconceived predilections. Moreover, the application of the principles of international law to concrete problems is the best way of making students aware of both the limitations and the reality of international law.

(c) *Examination Questions.* A number of problems that might be discussed under this heading are not peculiar to international law and will, therefore, be ignored. One point, however, is important. Too often international law is an 'easy option' and, therefore, equally suspect to teachers in other branches of the law and to the better type of law student. If international law is not to degenerate into an amalgam of Jurisprudence and Political Science, it must be taught, and examined, as a technical law subject.

Nothing can serve this purpose better than problem questions. The test of the good lawyer is whether he can apply his book knowledge to the solution of concrete cases. For this reason, the practice has been established in the University of London that every question consists of two parts : the first, a general question on one of the basic principles of international law, and the second, a related case.

II. *Postgraduate Teaching.*

International law has grown so much in scope that undergraduate courses can no longer do full justice to all the new fields which have sprung up. They urgently demand specialisation and full treatment in separate lecture courses. By way of a first instalment, the University of London has chosen The Law of International Institutions and International Economic Law as suitable branches of international law to be taught in lecture courses and seminars at the LL.M. level.[1] Although formally at an undergraduate level, a new course in Sociology of International Law for International Relations specialists in Part Two of the B.Sc.(Econ.) course should be mentioned in this connection. The addition of courses in International Labour or Air Law could well be justified, but there are limits to the expansion of the staff in the international law department of every Laws Faculty.

Finally, a word must be said on the encouragement of postgraduate research by way of dissertations and theses. The horror of every examiner is the candidate who produces the tenth book on a subject on which nine previous monographs have already been written. The real culprit is not, however, the student, but his supervisor. Experience appears to suggest that this deficiency occurs most frequently when attention is concentrated unduly on the doctrine of international law and its history. It is then hard for anyone to be original and to achieve more than a lucid collection and a critical re-arrangement of already well-known material. There are plenty of subjects, however, where it is still possible for any intelligent postgraduate student to be the first in the field.

Some of these may at least be listed :

First, the State practice and the decisions of national courts (systematically presented) of most countries are still insufficiently explored.

Secondly, any of the new fields mentioned above (the Law of International Institutions; International Economic Law; International Labour Law and International Air Law) offer plenty of scope for monographic treatment. In particular if postgraduate

[1] See Appendix.

students are taught to look for the optional standards embodied in the relevant treaties, these subjects cease to be dry and merely 'technical'.

Thirdly, the History of International Law, as distinct from the history of the doctrine of international law is far from being exhausted. All that is necessary is that the international lawyer learns how to use from his particular point of view the original source material that is the daily bread of the trained historian. One of the chief results that may be expected from such studies, especially in the field of ancient treaties, is a truer appreciation of the origin of concrete rules of international customary law. To judge by the writer's own research in this field, it is likely to emerge that most rules of international customary law are merely treaty clauses which were gradually discarded because they were considered redundant. At the same time, it will become possible in this way to date with relative accuracy the time when a principle of international law graduated from an optional treaty standard into a compulsory rule of international customary law.

Fourthly, the best—and only the best—postgraduate students should be encouraged to engage in studies in the field of the Sociology of International Law. Work of this kind is more than the quest for knowledge for its own sake, though as such not to be despised. It is essential to indicate both the limitations and potentialities of international law in any particular period and in any concrete international nexus. Thus, it is an indispensable auxiliary of another branch of international law which is still in *statu nascendi*; the science of international legislation.[2] To enlarge on this subject would go beyond the compass of this paper. In any case, probably too much heretical thought has already been voiced in this paper, and in heresy, too, there is an optimum beyond which it ceases to fulfil a socially useful function.

GEORG SCHWARZENBERGER.

APPENDIX

LL.M. SYLLABUSES OF THE UNIVERSITY OF LONDON IN INTERNATIONAL ECONOMIC LAW AND IN THE LAW OF INTERNATIONAL INSTITUTIONS

(1) *International Economic Law*

Definition. History. Sources. General Principles.

Principles of International Economic Law: Economic State Sovereignty. Economic and Financial Aspects of Exterritoriality. Freedom of Commerce. Freedom of Communications. Freedom of Navigation. Freedom of the Seas.

[2] See further 'The Frontiers of International Law' (Vol. 6 of *The Year Book of World Affairs*, 1952).

Standards of International Economic Law: Functions. Minimum Standards. The Standard of Reciprocity. The Most-Favoured Nation Standard. The National Standard. The Standard of the Open Door. The Standard of Preferential Treatment. The Standard of Economic Good Neighbourliness. The Interplay of the Standards. Circumvention and Infraction of the Standards.

International Economic Transactions: Treaties of Commerce. Agreements on Production, Conservation of Resources, Transport and Communications. Barter Agreements, Inter-State Loans, Monetary and Payment Agreements, and Foreign Aid Conventions. Double Taxation Conventions. The International Economic Law of Tort, with special reference to the Protection of Private Property abroad and State Contracts. Legal Aspects of International Economic and Financial Control.

The Law of Economic Warfare: Economic Reprisals. The Law relating to Trading with the Enemy. The International Economic Law of Military Occupation. Economic War Crimes. The Protection of Neutral Property. War Claims. The Law of Restitution and of Reparations.

International Economic Institutions: Representation of Economic Interests Abroad. Economic and Financial Unions, with special reference to Customs Unions. The Economic and Social Council of the United Nations. The International Bank for Reconstruction and Development and the International Monetary Fund. The International Trade Organisation. Regional Economic Organisations, with special reference to the Organisation for European Economic Co-operation. International Economic Sanctions.

(2) *Law of International Institutions*

General Aspects of International Institutional Law: Definition. Development. Sources. Functions and Types of International Institutions. General Principles of International Institutional Law.

Judicial International Institutions: Functions. Organisation. Jurisdiction. Procedure. Award, Judgment, Advisory Opinions.

Administrative International Institutions: Functions. Membership. Organisation. Jurisdiction.

Quasi-Legislative International Institutions: Functions. Membership. Organisation. Jurisdiction.

Comprehensive International Institutions: Functions. Membership. Organisation. Jurisdiction.

[The writer desires to express his thanks to the University of London for permission to reproduce these syllabuses from the Regulations for Internal and External Students in the Faculty of Laws.]

CONFLICTS OF WESTERN AND NON-WESTERN LAW

I

THE subject which I propose to discuss is of necessity but a small part of a vast field, namely the situation which arises when a country whose law is founded in the civilisation of Western Europe, is obliged to consider what degree of recognition it will give to laws practised and obeyed by communities of its subjects, which laws have their origin elsewhere.

Two questions arise : (a) Does the country and its courts acknowledge the non-Western [1] legal order as law? (b) Do they acknowledge the non-Western law as the equal of their own Western system?

We should further bear in mind that the reverse question is also possible : it has happened before and will happen again, that the judges of a non-Western State ask themselves the same question with reference to Western law. For instance the Ottoman Empire in the height of its power allowed Christian and Jewish communities of its subjects to live under their own Christian and Jewish law, but without acknowledging such law as the equal of Muhammadan law. Muhammadan law was always applied in legal relations between Muhammadans and non-Muhammadans and also in the disputes between Christians on one hand and Jews on the other. This aspect of the problem will probably once more become important in the new Asiatic States having an Eastern Family Law.[2]

The earliest attitude of Westerners to this question, an attitude which is not yet wholly extinct, is to regard the rules of social intercourse observed in non-Western communities as not being in

[1] The term 'non-Western' perhaps needs explanation and justification. The alternative 'Oriental' is inapt since some of the laws concerned, *e.g.*, those of Mexico, Peru and of the American Indian tribes of Canada and the United States, are in no sense Oriental. The words 'native' and 'indigenous' have sometimes been used in a derogatory sense and are therefore to be avoided: moreover Islamic law, one of the principal systems to be considered, cannot really be called native or indigenous anywhere but in Arabia. Nor can a clear definition be made on a religious basis since at least one important body of law concerned, namely the Adat law of Indonesia, is not a religious law. By the phrase 'non-Western' therefore is implied all law which is not of European ancestry.

[2] As we proceed with our discussion we shall see that the problem narrows down to one of family relations.

any true sense law : according to this view, they may be usages or customs or they may have been imposed by force but they cannot be recognised as law. This conception has been nourished by purely material interests and defended by bombastic theories.

When in the beginning of the sixteenth century the Spaniards conquered Mexico and Peru, and enriched themselves by robbing the treasures of the Aztecs and the Incas, their action was excused by the historians of those times who asserted that these treasures were not owned by anybody since the American Indians, barbaric non-Christians as they were, were devoid of any law. It is one of the great merits of Francisco de Vitoria, professor of Theology and International Law at Salamanca, that in his *Relatio de Indis* (1539) he defended the rights of the Peruvians.[3] Apparently Vitoria's contemporaries had based on their reading of Aristotle an argument that the Indians, being barbarians, were slaves by nature, albeit slaves *a non domino*, and therefore incapable of property. Vitoria replied : ' The Europeans who discovered America could have no better right with respect to the persons and properties of these Indians than the Indians would have had had they been the first to discover the Spaniards or French '.

But although Vitoria in this manner defends the rights of the Indians to their properties and their estates, it is noteworthy that he does not do so on the ground of their law, but by virtue of Roman law, regarded as *ratio scripta* and *jus naturæ* and therefore of universal validity and applicable also to the Indians. Justinian's *Digest* and perhaps also the universal claims of the early Canon law, are the basis of his argument. The Indians, when the Spaniards arrived, were in peaceful possession—*in possessione*—of their goods. Consequently they must be looked upon as proprietors *donec probetur in contrarium.*

This was a great step forward but it was not yet acknowledgment of non-Western law. Before such law can be acknowledged it must be studied and understood ; and down to the present day the failure to appreciate non-Western law at its true value is commonly based on ignorance.

Knowledge of American-Indian law was first obtained by the men on the spot, the civil servants and missionaries, Jesuits especially, who lived among the Indians : for instance Josephus de Acosta whose *Natural and Moral History of the Indies* (1590), originally written in Spanish, was published in an excellent English version by the Hakluyt Society (1880). De Acosta points to the misery which arose from a failure of the rulers to acknowledge the

[3] The book, like Aristotle's *Ethics*, consists of notes of his lectures taken by diligent pupils. *Sit bonis boni exemplar.*

law of the people. This, he says, is the reason why the Spaniards were hated even when their measures were well intentioned. He contends that the Indians are entitled to abide by their customs; that no more Spanish law should be introduced than is strictly necessary, since a state of anarchy will arise if the Indians are no longer allowed to observe their own law while they do not understand ours.

'Let them have their own customs', he writes, 'let them keep their own religion as much as possible, leave them in the possession of their temples and idols, but only see to it that no inhumanities occur. Impart to them Christianity in their own language—and, God willing, this people that God seems to have forgotten so long, will be enlightened and will abandon their idolatry.'

Vitoria's conception may perhaps have rested not only on the view that the *corpus juris* contained a principle of universal application, but also perhaps on the principle that in a conquered country the law of the conqueror, in this case Spanish law based on Roman and Canon rules, is to be applied.

One may compare a change in the attitude of the Dutch East Indian Company. In 1619 when J. P. Coen took Djarkarta by force, Dutch law was introduced for the whole population : but in the territories, which were later yielded by treaty by the Javanese and other princes of Middle Java, the native population continued to enjoy their own law, Dutch law being valid only for the Dutch.

It was by this time out of the question for Indonesian law not to be recognised. Grotius in his early work *Mare Liberum* declares : 'Java, Sumatra, the Moluccas have their own kings, public institutions, laws and rights and they have had them always. One is not entitled to deprive these infidels of their civil and princely power because they do not believe. Indeed it is even heresy to assume that the infidels should not be master of their goods, for it is no less theft and robbery to deprive them of their goods than it would be if a Christian were concerned'. But all these things are different if there should have been a justifiable war (*bellum justum*). In that case the property becomes the property of the conquering state and the latter is qualified to introduce into the conquered country its *own* law.

In England also this doctrine held good in olden times, but at the beginning of the seventeenth century a distinction is made according as the conquered country is Christian or non-Christian.

In *Calvin's Case*[4] appears the following : 'If a king conquers a Christian Kingdom, he may at his pleasure alter the laws of the

[4] (1608) 7 Rep. 17.

Kingdom, but until he does so, the ancient law remains. But if a Christian King should conquer the Kingdom of an infidel, and bring them under his subjection, then *ipso facto*, the laws of the infidels are abrogated, for that they are not only against Christianity, but against the law of God and of nature contained in the Décalogue '.

This is the generalisation of ignorance. Without scrutiny of any sort, the laws of a non-Christian State are estimated to be contrary to Christian principles and subject, therefore, to wholesale condemnation. Such sweeping generalisation is, I venture to say, un-English; and it is not surprising therefore that before the end of the seventeenth century in the case of *Blankard* v. *Galdy* [5] Coke's sentence was mitigated as follows: ' Where it is said in *Calvin's Case*, that the laws of a conquered (non-Christian) country, do immediately cease, that may be true of laws for religion, but it seems otherwise for laws touching the government '.

And in 1744 the distinction made in *Calvin's Case* between Christian and non-Christian countries was entirely put aside in *Campbell* v. *Hall* (Co., p. 209) 20 St.Tr. 239, in which Lord Mansfield laid down the rule: ' . . . that the laws of a conquered country continue in force until they are altered by the conqueror ', and he added, ' . . . that the absurd exceptions as to pagans mentioned in *Calvin's Case*, in all probability arose from the mad enthusiasm of the Crusaders '. Indeed, it appears that during the argument Lord Mansfield interrupted counsel for the plaintiff with the words ' Don't quote the distinction [between Christians and non-Christians] for the honour of my Lord Coke '.

A modern example of the conception that non-Western law is no law, is given by German colonial theory. When the imperial German Government, in the wake of private merchants and the trading companies, cast covetous eyes upon African territory, extensive estates were already found there, some simply occupied by the German pioneers, others obtained from African chiefs in exchange for cheap circulating mediums.

What law had been applied in these transactions between Africans and Germans? Could there be a question of any African law? Did the Africans have any *right* to the lands they cultivated, to the goods they considered as their own? One of the best-known German authors in the domain of international private law, Professor Karl Neumeyer, still answered these questions in the negative in an article in *Die Zeitschrift für Völkerrecht und Bundesstaatsrecht* of 1912, that is just before Germany lost her colonies. According to him, there could be no valid local law *before* Germany

[5] Comberbatch 228.

took possession of these African territories, because those territories were not States, at least they did not belong to the States acknowledged by Germany according to international law. Before their incorporation in the German Imperium 'indigenous laws' says Neumeyer 'could not be acknowledged as such'. Accordingly there could be no question of the application of any but German law to the acquisition of land by the German pioneers since there was no other law in force. Only after incorporation does it appear that there has been a conflict of laws concerning those land transactions: a conflict between the retrospectively acknowledged indigenous African law and the German law. What bearing, if any, Neumeyer's theory was to have on judicial decisions is far from clear: but the acquisitive bias is obvious.

But at the present day it is hardly, if at all, doubted that non-Western law is valid law for the autochthonous population in a country under Western rule. The question then arises what law is to be applied when Westerners enter into legal relations with non-Westerners. In Holland we call this *intergentiel recht*; the French speak of it as *Droit international privé interne*—a contradiction in terms—or of 'le conflit de lois colonial'. English writers have spoken of it as inter-racial, inter-communal or inter-religious private law, for in most cases in which the English have had to deal with it, a difference of religion is involved. The field is further narrowed by the fact that it has been found essential to have uniform law of contracts and other commercial topics, such as bankruptcy, and civil wrongs, and of land ownership and possession common to all persons in the territories concerned. In general such uniform law has been arrived at on models almost entirely Western except in the case of land, where (as for instance in India) a composite of Western and non-Western elements has been evolved. Almost the only field in which acute cases of conflict arise is, therefore, that of family law.[6] As far as my information goes, these conflicts in the field of family law have been more numerous in the French colonies and in Indonesia than in the British possessions, a circumstance which is perhaps due to the much wider social gap in the latter between the European and the autochthonous population. Let us then, compare the Dutch and French conceptions.

II

French legal theory and French case-law start from the postulate of the superiority of the French law to the law of the autochthonous

[6] There are signs that in countries such as India, Pakistan and Indonesia which have recently achieved independence, the new rulers intend far more drastic reforms in their ancient laws than the former foreign rulers would have ventured to contemplate.

population. Very recently this theory has been modified but so far without any appreciable change in the law. Accordingly French law in such cases is always given primacy since it is the law of the more developed and more highly civilised nation, namely France, whose duty it is felt to be to raise the colonial peoples, by history entrusted to her, to the same level of civilisation which she herself has reached. It is felt that France would be false to this ' mission sacrée ' if she allowed French law to be overruled by any other system.

You will note that the French doctrine, like that of Lord Coke in *Calvin's Case*, passes a sweeping judgment on the indigenous law as a whole without going into the examination of separate rules. The system as a whole is regarded as inferior to French law and therefore must give way to the latter.

It follows that if anyone to whom French civil law is applicable enters into a personal relation with another who is subject to the indigenous law, the relationship must be governed by French law. If a French citizen marries an Algerian or Indo-Chinese this marriage must be celebrated before the French registrar of marriages, it is subject to French law and the children also are *citoyens français de statut français*, governed by the French Code Civil. The citizen to whom the Code Civil is applicable continues to be governed by it in all inter-racial relations, nor will his or her children ever be governed by the indigenous law. Of this a striking instance may be given in a decision of the Court of Justice of Algiers of December 12, 1932.[7] In Tunis an Italian woman married a Tunisian Jew. He repudiated her by *ghett* under Tunisian Jewish law. This she refused to accept and petitioned for divorce. The conflict was not between French law of Civil Code and the Tunisian Jewish law, but between the Italian law of the wife and the law of the French protectorate, regarding a marriage celebrated in Tunisia in Tunisian fashion, between parties living in Tunis, the husband being a Tunisian Jew. Had this been an ordinary case of international private law, either the *lex loci celebrationis* or the law of the matrimonial domicile (according to the system of private international law prevalent in the courts concerned) would have been applied. In either case the result would have been the same, namely, the application of Tunisian law. But the Algerian court held that the rules of private international law presupposed a certain equality between the laws which may be applied and this equality is lacking in a conflict between European and Tunisian Jewish law. The court says that Tunisia is a protectorate and that the *raison d'etre*

[7] Clunet 1936, pp. 158 fol.

of the political position is a certain limitation of the sovereignty of the protected State not only in matters of public law but also in matters of private law in order to secure the predominance of the European law, in this case the Italian law of the wife, over the Tunisian law of Oriental origin. Is not this Coke *redivivus*? [8]

So the Minister for the French overseas territories, writing in *The Revue Critique*, 1948, p. 545, says: 'In case of a conflict between the normal legal system of the French common law and a local legal system, it is the former which must necessarily win'. That is to say French law is the norm; indigenous law is abnormal, temporary, transient, '*jurisprudence d'exception*', and limited in its scope.[9]

III

In Indonesia quite a different attitude has been taken alike by the Legislature, the courts and the theoretical jurists. Inter-racial conflict of laws, or as in those old days it was still called 'quasi-international private law', was discussed in detail at a congress of the Dutch East Indian Society of Jurists in Batavia in 1887; and the fundamental equality of Eastern and Western private law was accepted by the majority of those present. The congress was principally concerned to solve the problem of mixed marriages; and it was part of the general legal atmosphere of that period that in matrimony the law of the husband was regarded as more important than the law of the wife. The following propositions were therefore accepted:

(a) in a marriage between a European man and an Indonesian or Chinese woman: (i) the marriage must be solemnised according to the personal law of the man, (ii) it is this law which governs the relations betwen husband and wife, and prohibits polygamy, and (iii) it is again this law which decides whether, and if so, on what grounds, and by what procedure a divorce may be obtained;

(b) *e converso* the personal law of the man must prevail as regards forms of matrimony, incidents of the matrimonial status, including polygamy and dissolution of marriage, in all cases where an Indonesian or a Chinese man marries a European woman.

The conclusions of this congress were embodied in a Royal Decree drawn up in 1896, which has remained the law of Indonesia to this day. Accordingly, where a European man marries an Indonesian

[8] The doctrine found outlined underwent an apparent rather than a real modification (Art. 8 of the Constitution of the same year). For in fact, the difference in personal law remains unaltered, though instead of distinguishing between 'citoyens' and 'sujets français', the terms in use are '*citoyens de statut civil*' and '*citoyens de statut personnel, particulier ou local*'.

[9] For further illustration of the French point of view see below p. 317.

woman, the marriage must be celebrated in the presence of a European registrar. But if a European woman marries an Indonesian man, the marriage must be solemnised according to the personal law of the Indonesian man, and if he is a Muslim, according to the Islamic law. Further, as the woman, according to the prevalent system of Islamic law of the *shafi'i* school, must be given in marriage by a guardian (*wali*) who should normally be a relative and a Muslim, and as the European woman generally speaking will not have such a relative, the requirements of the Muslim law are met by a so-called *Penghoeloe*, who acts as her *wali*. Many such marriages have been contracted by women who, before their marriage, were subject to European law, but there is no doubt that by this marriage they became subject to Muhammadan matrimonial law with its possibilities of polygamy and private divorce by the husband. I am not personally aware of any case in which an Indonesian man, having married a European woman took a second wife, but I do know of a case where a European woman consented to marry an Indonesian, a Balinese prince, who was already married.

Not only in matrimonial law, but also in the law of inheritance and in cases concerning illegitimate children the same postulate of equality of Western and non-Western law prevails in Indonesia, irrespective of whether application of European or Indonesian law will be the result. At this point I must refer to a doctrine which is unknown in English law, but familiar to many Continental systems, the doctrine of recognition of illegitimate children. The child of an Indonesian woman born out of wedlock but recognised by its European father follows its father's status; similarly the child of a European woman born out of wedlock but recognised by its Chinese father, follows the status of the Chinese father and will be a Chinese in the eyes of the law. This would be impossible according to French law in which the status of the child always follows the status of that parent who is governed by the higher esteemed code civil.

Similarly in Indonesia succession, both testate and intestate, is governed by the personal law of the deceased, whether European or Indonesian, and not the law of the heirs. Consequently the Christian wife of a Muslim Indonesian husband will be barred from inheritance by difference of religion, since that is a bar to inheritance in Islamic law; but the Indonesian wife of a European husband will be barred since in the system of the husband there is no such qualification.

What basic principle underlies this Dutch concept of equality? Surely this, that one can never call one legal system in itself, higher or lower, better or worse, than another, there is no standard by which to measure it (Koschaker). The question whether a

legal system is good or not can only be considered in connection with a group of persons to be governed by it. For persons living under other social conditions, having other customs and other moral and religious conceptions than we Westerners have, other legal systems, different from ours, may be appropriate and therefore right. It is not for the judge to try to promote through judicial channels the spread of Western civilisation. To the judge Western and non-Western law must be equal since each applies to a part of the population of one and the same territory, though a Western judge may well believe his own system to be the better and an Eastern judge in his place be of the opposite opinion. But each should realise that his personal preference should not guide him in his judicial decisions. Had the Dutch attitude been different there would have been reason to fear that after the transfer of sovereignty in Indonesia, now that all Dutch judges have been, or are being, replaced by Indonesians the latter would apply in all inter-racial cases the Eastern family law, the Islamic law, Chinese law, Adat law, which (and this is particularly true of the Islamic law) was considered to be of far higher value than the Western. But as the Indonesian judges have absorbed the Dutch doctrine of the equality of our laws, one may reasonably expect that they will continue in inter-racial relations to apply Western law wherever legal grounds for doing so are present.

IV

So far I have spoken about legal conflicts as they presented themselves in overseas territory only, *i.e.*, between Western law, which has penetrated into that territory, and the indigenous law which is still in force there. But similar legal conflicts may present themselves in the European homeland, when Asiatic or African people from the overseas territories come to Europe; as for instance when Indonesians come to the Netherlands, or Hindus and Muhammadans from India and Pakistan come to Britain, or Algerians and Moroccans come to France. In the case of Holland the question is whether to apply the indigenous law of Indonesia or the civil law of Holland to such persons. Obviously in this case we have *not* to do with an inter-racial conflict. The Adat law of Indonesia and the Civil Code of Holland do not apply in such a case in one and the same country, as they are laws of different territories; the conflict between them therefore is a normal international conflict of law, and would be presumably so regarded in England. But in Holland this sort of legal conflict is in a class by itself. We did so, formerly, when Indonesia still formed part of the Netherlands Kingdom, in the first place because these conflicts occurred *within*

one State, and accordingly were not international; but, secondly (and this reason is still operative) because we applied to legal conflicts which concern both Indonesia and the Netherlands principles other than those we apply in international private law. In international private law, the Netherlands is one of the countries which applies the principle of nationality to questions of personal status. However, in Dutch-Indonesian conflicts we adhere, like England, to the principle of domicile. Therefore we formerly called this part of the law of conflicts by a separate name : conflicts of inter-regional law, and now that Indonesia is a sovereign State, but united with the Netherlands in a Union, we call them Union-regional conflicts of law.

These conflicts of law, arising from the fact that Asiatics and Africans go to Europe, are of perhaps the greatest practical importance for France.

At the moment there are about 180,000 French Muhammadans in France, in Paris alone there are about 75,000. The number of Algerians in France married to French women is estimated to surpass 5,000 (J. J. Rager—*Rev. de la Mediterranée*, 1950, No. 2, k. 78). Their number has highly increased since 1946 when all French nationals acquired the status of ' citoyens ' and the regulations of immigration for French citizens and Algerians were unified. After that date as a consequence of these new laws the social provisions, especially the allowances for the unemployed, apply in France to the Algerians as much as to the French. The wages are higher in France than in Algeria. The Algerian, unemployed, is better off in Paris than the Algerian unskilled labourer at work in his own overpopulated country.

I know of no English statistics concerning immigration from the Asiatic and African parts of the Commonwealth but I believe that at any rate the number is greater than in the Netherlands, though in the Netherlands it is also impossible to give any exact figure of the number of Indonesian settlers. Judging from the census taken in 1947, we can only gather that in May, 1947, 2,227 Netherlands subjects, who were not Netherlanders in the narrow sense of the word, found themselves in the Netherlands. However, not all of them were Indonesians; among them were a thousand Chinese who were Netherlands subjects, possibly from Indonesia. So we may reckon that about one thousand Indonesians live in Holland, even though in the same census of 1947, only 300 persons gave Islam as their religion. This figure is certainly too low. These figures make it clear that the problem of the conflict of Western and non-Western law in the home-country itself is of a far greater importance for France than it is for Holland.

How does France solve this conflict? Since even in the overseas territories French law ranks above Indo-Chinese or African law, it follows that in 'La France Metropôle' only the application of French law can be considered for marriage and divorce. Similarly, though on different grounds as we shall presently see, the Indian or African in London, and the Indonesian in Amsterdam can only contract a valid marriage according to the *lex loci celebrationis*. But what law governs such a marriage contracted in the European country when the married couple make their home in the Asiatic or African country of the husband? The tribunal of Hanoi gave judgment on this question on March 16, 1920.[10] A native of Annam, one of the States of Indo-China, had married a French woman in Paris by French ceremony and the married couple had settled in Annam. Some years later the woman sued for divorce under the French Code Civil on the ground that her husband had taken a concubine, a woman of Annam, concubinage being permitted by the law of his domicile and giving no ground for divorce to the first wife.[11] The court gave judgment for the plaintiff on the ground that the Annamite husband, having married a French woman in France before a French registrar, had broken that marriage which was governed and must continue to be governed by French law. His defence was rejected with the remark that he surely could not have expected that a polygamous relation could result from a ceremony accomplished before the French registrar. The quintessence of the position is not merely that the marriage contracted in France was governed by French law, but that the marriage continued to be governed by French law, even after the couple had made their matrimonial domicile in Annam, and consequently that a French marriage could never be converted into an Asiatic marriage permitting polygamy, no matter how long a married couple may remain in Annam. Yet by contrast, suppose a marriage between a French woman and a Dutch, English or American man, and suppose that the couple after marriage establish their domicile in the country of the man, and that the woman takes the husband's nationality. In such a case the French judge would certainly have not hesitated to hold that the matrimonial status treated by a French ceremony was governed *quoad* divorce

[10] Dareste 1930–3, 110; Penant 1930–1, 46.

[11] For the purposes of this case it is immaterial whether the second woman was a second wife or a concubine. Annamite law, like Chinese law, recognises both these possibilities, and the line between them is sometimes difficult to draw. The point at issue was that the husband's continued *consortium* with the second woman would have been a matrimonial offence in French law, giving grounds for divorce, but would not have been such an offence by Annamite law.

by the personal law of the husband.[12] The basic postulate of the Hanoi court's decision is that the law of the husband, being a non-Western law, is inferior to French law and that therefore French law continues to govern the marriage; and this postulate the Hanoi court was in a position to enforce. The consequence of this view would appear to be not only that the marriages of 5,000 Algerians contracted with French women in France would continue to be governed by French law if the married couples should go to Algeria, a view with which we may well sympathise, but also that Algerian men who have married Algerian women in France will find that French law continues to be applicable to the marriage in Algeria in spite of their return to their own homes. Direct legal authority, however, for this extreme but logical result appears to be lacking.

And now for the English view of the question.

After Lord Mansfield's strictures on Coke, questions raising the conflicts, which we are considering, appear to have been mainly questions of marriage, either of the recognition which English law could or could not accord to marriages under polygamous systems, or of mixed marriages between Westerners and non-Westerners. I am not sure that English law is quite settled and I hesitate to express any opinion too positively. It may well be also that the attitude to these problems taken in different jurisdictions of the British Commonwealth differs by reason of local conditions and particularly the constitutional laws of each separate territory. With due diffidence I submit that in the development of English law on these problems during the last 120 years successive phases can be distinguished. The first phase is characterised by a view that British courts can take no cognisance whatever of the non-Western law on these matters unless it is proved to be substantially identical with the English law in regarding marriage as the 'voluntary union for life of one man and one woman to the exclusion of all others'. The earliest judicial pronouncement in this sense appears to be that of Lord Brougham in *Warrender* v. *Warrender*.[13] His Lordship laid down that a marriage good by the laws of one country (namely the country where it is celebrated), is held good in all others where a question of the validity may arise. But afraid of the possible results of applying this doctrine to marriages under non-Western systems he added, 'there may go two different things under one and the same name of marriage in two different countries'; and he proceeds: 'marriage is one

[12] The fact that generally speaking Western laws do not recognise extra-judicial divorce is not the ground of distinction in French law.

[13] (1835) 2 Cl. and F. 488.

and the same thing substantially all the Christian world over, and it is important to observe that we regard it as a wholly different thing, a different status, from Turkish or other marriages among infidel nations '.

This is the first case which marks the line of separation in this field between Western and non-Western law, or Christian and non-Christian law; on which has been built the doctrine that English municipal and also English international private law take cognisance of marriages which may be called Christian and regard all others juridically as a mere nothing. This view was summed up in the well-known sentence of Lord Penzance which I have already quoted.[14] But for many years the definition was given a far wider application than Lord Penzance himself intended. He prefaces it with the words ' for this purpose ', *i.e.*, for the purpose of considering the jurisdiction of his court : and he explicitly stated that he was not passing upon questions of the rights of succession, legitimacy, or mutual duties.

In 1887 [15] it was decided that the marriage of a domiciled Englishman in Africa with a woman of the Baralong tribe according to the custom of that tribe, although it may there take the name of ' marriage ' and the parties to it be designated as ' husband ' and ' wife ', cannot be regarded as a marriage according to the law of England because it is not formed on the same basis as marriages throughout Christendom, in as much as it is not in its essence the voluntary union for life of one man and one woman. Consequently the children of this so-called marriage were held to be illegitimate, not being born in wedlock in the Christian sense of the word.

In recent years this judgment has been defended on the ground that Bethell at the time of the marriage was still domiciled in England, and therefore, according to English conceptions, the law governing the essentials of the marriage was still English law and not the native custom. He could have been married to the Baralong woman by the British chaplain at Buluwayo. But this was not the *ratio decidendi*. The decision was based on the postulate that the non-Western, non-Christian marriage which admitted the possibility of polygamy could not find, in any way, acknowledgment in English law. As another judge in *Harvey* v. *Farnie* [16] formulated the rule, a polygamous marriage is ' a union falsely called marriage '.

This opinion has now been abandoned. To have carried it out

[14] *Hyde* v. *Hyde and Woodmansee* (1866) 1 P. & D. 130
[15] *In re Bethell* (1887) 38 Ch.D. 220.
[16] (1882) 8 App.Cas. 43.

consistently would have led to much hardship and injustice.[17] The first change of view is marked by the *Sinha Peerage Claim Case*,[18] 1939, in which Lord Maugham L.C. said:

'It cannot, I think, be doubted now that a Hindu marriage between persons domiciled in India is recognised in our courts, that the issue is regarded as legitimate, and that such issue can succeed to property, with a possible exception'.

Following this: In *Srini Vasan* v. *Srini Vasan* [1946] P. 67, an English woman domiciled in England secured a declaration of nullity in respect of her marriage in England with a Hindu, on the ground that he was previously married to a Hindu woman in India. This was followed in *Baindail* v. *Baindail* ([1946] P. 122), but as Dicey, or rather his later editor (p. 25) says: 'There is still remarkably little English authority as to the precise extent to which such (polygamous) unions will be recognised'.

In English legal theory the most important point is always the construction of statutes, where such statutes are to be applied. So it has been suggested that succession to the personal property of a Hindu who died domiciled in England, including the rights of his children born of polygamous marriage celebrated while he was domiciled in India, will depend upon the construction of the Administration of Estates Act, 1925; and in *Baindail's Case* already quoted Lord Greene M.R. expressly left open the question whether a man domiciled in a country where polygamy is permitted can be prosecuted in England for bigamy in respect of a second marriage in England. This, he said, would depend on the construction of the words 'being married' and 'marries', in the Offences against the Person Act, 1861, s. 57.

It would probably be agreed, first and foremost, that when the term 'marriage' occurs in a British statute territorially intended for the homeland only, it must be understood in the English sense. But I venture to suggest that if English municipal law is applied in international relations in accordance with English doctrines of the Conflict of Laws, this does not necessarily mean that the word should have in its international relation exactly the same sense as it has in its internal or municipal aspect; some modification becomes necessary when the Act is applied to a situation which is not in contemplation of Parliament when it was passed. Thus Lord Penzance was right when he said that it would be absurd to divorce a

[17] In South Africa, however, it seems to be still accepted, for as late as 1931 it was decided by the Supreme Court of South Africa that an Indian woman, married in India to an Indian Hindu, was an unmarried woman by the law of the Union of South Africa. (Journal of Comparative Legislation 1934, 107.)
[18] 1938, 171 Lords Journals 350, S.C.; [1946] 1 All E.R. 348.

Hindu from one of his women on the ground that he had committed adultery and bigamy by marrying another.[19] But I suggest that if, for the purposes of international private law, it is admitted that a polygamous marriage must be regarded as a marriage, then, if according to the English rule the internal law is applicable to such a union the conception of its rules and terms must be adapted to the new situation which has arisen. Adultery will have to be regarded as sexual intercourse with any woman other than the women to whom the defendant is lawfully married.

Again, if, according to English law, the father is obliged to maintain his legitimate children, then, if this rule is applied to a father who is now domiciled in England, but who, according to the law of his former domicile was married lawfully to two wives at the same time, this father will be obliged to maintain the children of his two marriages. He cannot escape his duty of supporting these children on the pretext that under English law he is only obliged to maintain his legitimate children, and that according to English law it is impossible that children, born at the same time of different women, should all of them be legitimate. And likewise this same husband and father will be obliged to provide the two women with maintenance according to the English law applicable to them, although in English law, as enacted for the English citizen, one never thought of the possibility that a husband would have two legitimate wives.

So, since English international private law accepts as valid a family relationship which is rooted in the domiciliary law of another country, of India for example, English internal law, which becomes applicable when the spouses remove their domicile to England, will have to show understanding for the strange but continuing relation, which is thus brought under its authority.

But in another respect, the old view that English law only recognised the Christian marriage has maintained its influence. According to this idea, it was obvious that a marriage celebrated in England was a Christian marriage, which, as regards the relations between husband and wife, was governed by English law and continued to be governed by English law even if the parties removed their domicile to a polygamous country. For as polygamous law was no law at all according to this train of thought, only English law of marriage could be considered. However, now that in the last few years marriages contracted in India, between Hindus or Muhammadans who live there, have come to be recognised in England as valid marriages, the theory that a marriage contracted

[19] This, however, is exactly what is contemplated by the India Divorce Act, where the first wife is Christian, although the second union is lawful.

in England always continues to be naturally a monogamous marriage becomes more difficult to defend.

A marriage of an Englishman contracted anywhere in the world is to be regarded as an English monogamous marriage because, according to the law of his English domicile, he can only contract a monogamous marriage. *E converso*, assuming that a Hindu, according to the law of his Indian domicile, could not deprive himself of his right to polygamy; should he be deprived of that right by reason of a marriage contract in England during temporary residence here?[20] It will be universally admitted that the non-Western right of polygamy or repudiation cannot be exercised in England in respect of a marriage celebrated in this country, since the exercise of these rights will be against the public policy of English law. But when the young Hindu returns to India his English marriage—if it is still considered as a marriage at all—will not be regarded as an obstacle to the exercise of his polygamous privileges. Difficult as it may be for English law, or indeed any Western law, to accept the conclusion that women of European origin may be bound by the ties of a polygamous marriage through a form of marriage solemnised in England, one should not forget that this would be the conclusion of the law in force in the country where the husband and wife fix their domicile, in the same way as the consequence of the English domicile of the English spouses is that their marriage, celebrated in a polygamous country is a monogamous marriage.

And so Professor Cheshire, who in his brilliant book on Private International Law describes not only the law that is in force, but gives also his opinion on English law as it ought to be, comes to the conclusion that some improvement would be effected if what is believed to be the sound principle were adopted by the courts, namely, that whether a marriage is polygamous or monogamous is to be determined by the law of domicile, which means in the theory of Professor Cheshire, the law of the matrimonial domicile.

The suggestion of Professor Cheshire is substantially the solution already in force in Dutch Indonesian relations. This solution is laid down in an Indonesian statute, namely the Royal Decree of 1848 on the general principles of the law, as it was amended in 1915, where the general principle is that if a Netherlander goes to the Indies (*i.e.*, Indonesia) and settles there, the law of Indonesia

[20] Although the view of English law would apparently refuse to recognise that right, the prevailing view of the Indian courts is that an Indian who has contracted marriage in England is not deprived of his polygamous privileges thereby, although an English wife may regard the exercise of them as grounds for divorce.

will apply to him and if, on the other hand, Netherlands subjects from Indonesia, no matter what their race or religion, settle in Holland the Netherlands Civil Code will be applied to them.

The word 'settle' in this enactment may perhaps be modernised as 'fix their domicile'.[21] The result of this regulation as interpreted in all the legal literature is, first, that the matrimonial status (including questions of polygamy and divorce) is governed by the law of the husband's domicile. Whatever limitations may be imposed on this general principle in Holland by Dutch public policy, it is undoubted that as soon as the husband and wife are in Indonesia, a repudiation (talaq) issued by the man and valid by his personal Muhammadan law will also be held good in Holland. Although I know of no reported judicial decision on this point, it has frequently been held by the Dutch Registrar-General of Marriages on the advice of the department of overseas territories that a wife of Dutch origin who married an Indonesian in Holland, went with him to Indonesia and was repudiated there, was free to marry again in Holland, her first marriage having been validly dissolved by the Muhammadan repudiation. Indeed, even if an Indonesian had fixed his domicile in Holland and thereby become subject to the Netherlands Civil Code, and while so domiciled has married a Dutch woman, nevertheless, if thereafter he returned with his wife to Indonesia and so re-acquired an Indonesian domicile, the Dutch monogamous marriage would be transformed into an Indonesian (and if the husband were a Muslim, a Muhammadan) marriage.

Borderline cases, however, are conceivable where an Indonesian husband in Holland sends a *talaq* by mail to his wife in Indonesia, or where an Indonesian husband in Indonesia sends a *talaq* by mail to his wife who is still in Holland. I speak with diffidence but I am inclined to think that, in the former case at least, a Dutch judge would say: 'While you are in Holland, if you wish to dissolve your marriage, you can only do so by some means which is not in such manifest contradiction with accepted Dutch principles of fair dealing'.

By contrast it is remarkable that in France the right of the Algerian Muhammadan resident in France to repudiate by *talaq*

[21] The test of domicile in Dutch law is not quite the same as in English law. In both systems a merely temporary residence, *e.g.*, of a student for purposes of education, does not involve a change of domicile: and it is in respect of such temporary residents that most cases of mixed marriage arise. But a man who goes to another country to earn his livelihood, hoping to retire to his native land only when he has made a fortune or earned a pension, would be held in Dutch law to have acquired a domicile of choice in the country where his working life is being spent, though in English law he has not abandoned his domicile of origin.

his Algerian wife left behind in Algeria is not only accepted but is even regulated by circulars issued in 1930 and 1931 under the authority of the Ministère de l'Intérieur, the Ministère de Justice and the Procureur-Général de la Republique. Even before that Algerians in Paris had been used to giving powers of attorney to a friend or a member of the family to repudiate their wives in their name. But then the act of repudiation itself took place in Algeria and not in France. However, it seems that many difficulties arose in respect of these delegated divorces so, in 1930, at the instance of the Procureur-Général of Algeria, the authorities in France provided that the repudiation itself could take place in France before a notary and two witnesses, and that the friend in Algeria need only get letters of procuration to serve the deed of repudiation upon the wife. A notary in Paris, le notaire Sabot, was indicated, who practically has a monopoly of these Muhammadan repudiations. I have not complete figures on this subject, but I know that in 1939, 126 of these deeds of repudiation were drawn up in this Parisian notary's office.

The result is certainly odd. French jurists whose cardinal axiom in these matters is the superiority of the French Code Civil to all non-Western law find themselves compelled by circumstances to recognise an act of repudiation in the capital city of France contrary to the principles of that Code. In Holland (and, I submit, in England also) such an act would be regarded as void on grounds of public policy. [And what would the position in France be, if both the Algerian and his wife had taken up permanent residence there?]

For the second question just formulated, judicial authority is equally lacking; and the connection with the public policy of Dutch law is not so obvious. The repudiation is pronounced in Indonesia, the domicile of the husband, where it is valid: but its consequences reach Holland where the wife (though matrimonially domiciled in Indonesia with her husband) is still living. The validity of such a repudiation would probably be accepted by the Dutch Courts, as it would have been if the wife had accompanied her husband to Indonesia, a view in contrast with that taken in England by all the judges in the *Hammersmith Marriage Case*.[22]

Contacts between different civilisations are a fascinating field of study: but even the legal aspects of such contacts which we have now traversed would require, for their adequate survey, a bulky volume. We have traced the history of the topic from a time when non-Westerners were regarded as incapable not merely of a law of

[22] [1917] 1 K.B. 634.

their own but even of rights under Western law. This barbarous attitude to alleged barbarians gave way to a more civilised conception when it was realised (under Vitoria's leadership) that at least Roman law doctrines of *jus naturale* must apply to them. But even up to the end of the seventeenth century it was held that if a Christian king conquered a non-Christian country the non-Christian law as a whole was automatically superseded by the Christian law of the conqueror. Today, the view is universally accepted that non-Western law is law and must be recognised as such: but in France it is regarded, as a whole, as being law of a lower standard than Western law and therefore as bound always to give way when it comes into conflict with Western law.

In Holland and in Great Britain non-Western law is accepted, on the whole, as of equal status with Western law, though in regard to some peculiar institutions, polygamy for example, difficulties still exist, and I am not altogether sure (speaking with diffidence) that in England at least some traces of the old postulate of superiority do not remain. When we are brought face to face with legal relations unknown to our own law, we may well find that we have no rules of conflict appropriate to these unknown institutions. But we ought not therefore to refuse to recognise, or even in appropriate circumstances to give effect to, an institution or status unknown in our Western countries; rather, we should work out new rules applicable to the interplay of these strange institutions with our own. International private law is not merely a static group of fixed rules confined to the legal institutions of a definite number of Christian or Western States, but a dynamic entity which is constantly growing with the progressive integration of what is after all (and more obviously as time proceeds) a single world.

R. D. KOLLEWIJN.

RECOGNITION AND ENFORCEMENT OF FOREIGN LEGISLATIVE, ADMINISTRATIVE AND JUDICIAL ACTS WHICH ARE CONTRARY TO INTERNATIONAL LAW

By Felice Morgenstern, m.a.

Whewell Scholar of International Law in the University of Cambridge

I

The problem of the relationship between international law and municipal law is usually discussed by reference to the attitude of municipal courts to the law of their own State. Two significant facts may be noted in that connection. In the first instance, the courts of many countries, while recognising that they are bound to apply municipal law even if it is contrary to international law, have made it a rule of construction that laws must be so interpreted as not to conflict with international law unless the intention of the legislature to the contrary is beyond doubt.[1] In only a very small number of cases have they been compelled to find that the legislature intended to violate an international obligation.[2] Secondly, in several countries constitutional provisions have been enacted which lay down that international law shall be superior in authority to municipal enactments.[3] Some of these expressly provide for the judicial review of legislation in the light of international law.[4]

However, municipal courts are also called upon to recognise the effects of or to enforce official acts of a foreign legal system. Thus they may be required to recognise the effects of foreign legislative or administrative measures on title to property which

[1] See, *e.g.*, *R.* v. *Keyn*, 2 Ex.D. 63, 85 (England); *The Charming Betsey*, 2 Cranch 118 (United States); *Geoffroy and Delore* v. *Insurance Co.* '*Bulgaria*', *Sirey*, 1920, II, 17 (France); BGE 56, I, 237 (Switzerland); RGStr 62, 369 (Germany); *Clunet* 32, 416, 420 (Belgium); *Ex p. Koutalianos*, *Annual Digest*, 1943–5, Case No. 62 (Australia); *Croft* v. *Dunphy* [1933] 1 D.L.R. 225 (Canada); *Mohammad Mohy-ud-Din* v. *The King Emperor* (1946) 8 F.C.R. 94 (India).

[2] There is, for instance, no English decision to that effect.

[3] See, in particular, Arts. 26 and 28 of the French Constitution of October 27, 1946, and Art. 25 of the *Grundgesetz* of the West German Federal Republic, enacted in 1949.

[4] Article 100, para. 2, of the *Grundgesetz* of the West German Federal Republic entrusts this function to the *Bundesverfassungsgericht*.

has since come within their jurisdiction, or on the status of persons who are now resident there. They may be asked to apply foreign law to persons or property who have at all times been within their jurisdiction. Or they may be required to recognise the effects of a foreign judgment divesting title, or to enforce an unsatisfied foreign judgment. In the present article it is proposed to discuss the question whether in such cases they are bound to take note of the fact that the foreign act concerned violates international law, and to refuse it recognition on that score. In considering the matter, it will be assumed throughout that the foreign law is, according to the principles of the conflict of laws, the governing law, and that it is enacted by a recognised government.

It must be made clear that the question here discussed is altogether different from the question of bringing an action against the foreign State concerned. There are, indeed, cases in which an action is brought in a municipal court in a form which virtually involves the impleading of the foreign State. This was probably the case in *Carr* v. *Fracis Times & Co.*,[5] decided by the House of Lords in 1901. That was an action in tort against the commander of a British warship for the seizure of arms, the property of another British subject, in the territorial waters of Muscat. The arms appeared to be destined for Persia, and the Sultan of Muscat had authorised the seizure in conformity with the wishes of the British Government who desired to prevent the shipment of arms to that area. There was, however, no state of war, and the seizure was probably contrary to international law in that it constituted an infringement of the right of innocent passage through territorial waters in time of peace. The House of Lords held that the action would not lie. It did so partly because the requirement of the English rules of the conflict of laws, that the act should have been unlawful both by English law and by the law of the country where it was committed, was not satisfied. In that manner it accorded full recognition to the foreign law despite the fact that it conflicted with international law. However, the act in question having been approved by the Sultan of Muscat, and the action being one in tort, a finding for the plaintiff would have been tantamount to a judgment against the Sultan. It is believed that that aspect was foremost in the mind of Lord Lindley, the only one of the noble Lords to inquire into the relevance of the violation of international law, in expressing the view that an English court could not hold, by reference

[5] [1902] A.C. 176.

to principles of international law, that the Sultan had exceeded his powers in authorising the seizure. An even clearer illustration of the fact that in such a case the review of a foreign governmental act in the light of international law would be the equivalent of giving judgment for damages against the foreign government, is provided by the decision of the Supreme Court of the United States in *Underhill* v. *Hernandez*.[6] In that case an action for damages for detention was brought by a United States national against a Venezuelan military commander representing a revolutionary group which had, since the commission of the act complained of, become the recognised government of Venezuela. The action was dismissed. Had the matter been raised by the United States before an international tribunal the act complained of might have involved the international responsibility of Venezuela on the ground of a violation of the rules of international law regarding the treatment of aliens. In effect, it was an action for damages against the Venezuelan Government. There is general agreement that municipal courts are debarred from exercising jurisdiction over claims against States for public acts committed in their own territory.[7] In *Underhill* v. *Hernandez*, therefore, as in *Carr* v. *Fracis Times & Co.*, the municipal court was fully justified in declining to review the legality of the foreign act in the light of international law.[8]

However, the same considerations do not apply in cases where the denial of the legality of the foreign act does not constitute the substance of an action for damages, but in which the foreign legal act is, to give one example, a preliminary fact in the determination of the title to property which is in dispute between two private parties.[9] Admittedly, any review of foreign State acts in the light of international law may be tantamount to a finding that the foreign State has acted illegally. It was, accordingly, held by the Supreme Court of the United States in *Oetjen* v. *Central Leather Co.*[10] that

[6] (1897) 168 U.S. 250. See also *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347; *Eastern States Petroleum Co.* v. *Asiatic Petroleum Corporation*, *Annual Digest*, 1938–40, Case No. 35; *Stark* v. *Howe Sound Co.*, *ibid.*, 1933–4, Case No. 9; *McCarthy* v. *Reichsbank* (1940) 20 N.Y.S.2d 450. Contrast an early decision of the French Court of Cassation, reported in *Clunet* (1876), p. 274.

[7] See also *Brasseur* v. *The Republic of Greece*, decided by a Belgian court in 1933, *Annual Digest*, 1931–2, Case No. 85.

[8] But see Mann, in *Law Quarterly Review* 59 (1943), at p. 166, who maintains that even in this connection the acts of foreign States are not necessarily unchallengeable, and contends that, if they were wrongful by the foreign law, English courts should be able to hear an action in tort relating to them.

[9] While the property is in the hands of a foreign State the principle of sovereign immunity may preclude any examination of title to it.

[10] 246 U.S. 297. The principle enunciated in that case has been widely followed in the United States. See *e.g.*, *The Adriatic*, *Annual Digest*, 1919–22, Case No. 9; *Bernstein* v. *Van Heyghen Frères* (1947) 163 F.2d 246; *United States*

> 'the principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving title to property brought within the custody of a court . . . as it was held to be to claims for damages based upon acts done in a foreign country; for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be re-examined and perhaps condemned by the courts of another would very certainly impair the amicable relations between governments and vex the peace of the nations'.

However, there appears to be no principle of international law prohibiting municipal courts from making such a re-examination. Nor does international comity appear to have prevented municipal courts, in other connections, from castigating foreign law as immoral.[11] There is, in this connection, a distinction between an action relating to the illegal act, and the recognition of legal consequences arising out of that act. International law prohibits the exercise of jurisdiction by municipal courts with regard to the former. There appears to be no similar restriction of principle on their action with regard to the latter.[12]

II

Foreign Legislation and Administrative Decrees which Take Effect on Foreign Territory

There are three main grounds on which municipal courts may refuse to recognise the effect of foreign legislation or administrative decrees. In the first instance, where the competence of the foreign State to legislate with effect binding upon certain classes of persons or goods is limited by international law, it would appear that the foreign law cannot be regarded as the governing law, irrespective of whether it is regarded as valid by the legislating State or not. This is not, at the present day, of any importance in connection with the recognition of foreign legislative acts which took effect on the foreign territory. The doctrine of exterritoriality,

ex rel. Steinworth v. *Watkins* (1947) 159 F.2d 50. And see *Annual Digest*, 1938–40, Cases Nos. 11 and 12, and *ibid.*, 1919–42, Case No. 7, for a number of Dutch decisions apparently based on similar considerations. In English practice, the decision in *Luther* v. *Sagor* [1926] 3 K.B., particularly at p. 558, came near the acceptance of the principle.

11 See, for some instances of the reasons which prompt English courts to exclude foreign law which would normally be applicable, Cheshire, *Private International Law* (3rd ed. 1947), pp. 190 ff.

12 See, for a decision recognising this, *Papadopoulos* v. *Koninklije Stoombootvartmaatschappij*, *Annual Digest*, 1927-8, Case No. 17. And see van Praag, *Juridiction et Droit International Public* (1915), pp. 316 ff.

which implied that certain persons, such as diplomats, were not subject to the local law, has now become a matter of the past, and it is accepted that they are merely immune from jurisdiction. It would thus seem that public international law does not, in this respect, provide for any limitation, which is recognised by the rules of the conflict of laws, on the legislative competence of the State in relation to persons and objects who are within the limits of its territorial sovereignty. A possible exception is provided by persons or things who have been brought within the territorial limits of the State in violation of international law. But this is a problem which is of greater importance in relation to the judicial power of the State, and will, accordingly, be discussed in connection with the recognition of foreign judgments.

Secondly, in cases where the foreign State recognises the supremacy of international law in the municipal sphere, and in which its own courts are empowered to review its legislative and executive acts, with regard to their substance or the competence of the organ responsible for them, in the light of their conformity with international law, the municipal courts of other countries likewise can and should refuse to recognise the effects of an act which violates international law. This, at any rate, has been the view generally expressed in connection with the closely analogous problem of the validity of foreign law which is in conflict with the constitution.[13] The basis of this power of review is the fact that municipal courts, in granting recognition to foreign law, must ascertain whether the foreign law is, indeed, valid. In countries where the courts lack power to review legislative or executive acts with a view to ascertaining their conformity with the constitution or with international law, these acts are legally valid even if they constitute a violation of a formally higher law. In that connection—and that connection alone—it is true to assert, as the courts of the United States have so often done, that ' so long as the act is the act of the foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws '.[14] In countries, however, where such a power of review exists, failure to comply with the requirements of

[13] See, *e.g.*, Kunz, in Niemeyer's *Zeitschrift für Internationales Recht*, 32 (1924), p. 26; Niboyet, in R.D.I., 3rd Ser. 9 (1928), pp. 753 ff. particularly at p. 771; Neumeyer, *Internationales Verwaltungerecht*, 4 (1936), pp. 221 ff; Fedozzi, in *Hague Recueil*, 27 (1929), pp. 221 ff; Makarov, *ibid.*, 74 (1949), pp. 326; Wolff, *Private International Law* (1945), p. 175; McNair, *Legal Effects of War* (3rd ed. 1948), pp. 374–7, who points out, however, that municipal courts ought to accept the statement of the foreign Minister of Justice or other appropriate officer that the foreign law is constitutionally valid until the enactment has been pronounced invalid by the courts of the country concerned.

[14] See Woolsey, in *A.J.*, 44 (1950), pp. 129–135, for a discussion of some of the cases. See also the English decision in *King of the Hellenes* v. *Bostrom* (1923) 16 Ll.L.Rep. 190. In that case it was held, by reference to the

a superior law affects the validity of the legal act, which, accordingly, cannot be recognised by the municipal courts of other States.[15] Thus English courts have, on occasions, endeavoured to ascertain whether a foreign law was enacted by an organ which, under the foreign constitution, was competent to do so. In *Princess Paley Olga* v. *Weisz*,[16] to give only one example, there was some doubt as to the validity of a Soviet decree which had been made by the Council of People's Commissaries without the confirmation of the Executive Council. The court gave due recognition to that decree only after having established 'that no Russian court would require evidence that such a decree had been confirmed by the Executive Council'.[17] Similarly, in *Shapleigh* v. *Mier*[18] the Supreme Court of the United States was prepared to assume that, in adjudicating the title to land, now in the United States, which had been subject to expropriation proceedings while under Mexican sovereignty, it could examine the validity of the expropriation by reference to the Mexican Constitution, and found it to have complied with Mexican law. Moreover, a French court refused to recognise the effect of a Catalonian expropriation, consummated within Catalonian territory, on the ground, *inter alia*, that it was 'impossible to discover with any certainty whether these measures have been taken in conformity with the internal

contention that certain Greek decrees were in conflict with the Constitution of Greece:

> "The evidence is quite clear that they are *de facto* in force in Greece . . . The fact that they are in conflict with a document called the written Constitution of Greece does not seem to me to be of any importance . . . A written Constitution is a written Constitution as long as it is observed . . .".

[15] A distinction should, perhaps, be made in this connection between the practice of countries where a finding, by a court, that a law is unconstitutional, is declaratory of its nullity *ab initio*, and the practice of countries where such a law is valid until declared by a court to be null. In the latter case a foreign court would be bound to recognise the law until it had been declared null by a court of the State concerned. See, on this problem, from the point of view of the recognition of municipal law by an international tribunal, the *Georges Pinson Case*: *R.G.* 39 (1932) at p. 425. Even in the former case, it was there suggested, the matter should be left for the decision of a national court if the legislation in question has been in effect for a considerable period without challenge.

[16] [1929] 1 K.B. 718.

[17] At p. 723, *per* Scrutton L.J. This is so although the court asserted that no inquiry into the title of the Russian Government was possible (at pp. 724, 730, 736).

[18] *Annual Digest*, 1935–7, Case No. 14. See also *Sabariego* v. *Maverick*, 124 U.S. 261; *Fremont* v. *United States*, 17 How. 542. It has occasionally been contended that these cases were exceptional in that 'the Mexican government was not a foreign government, but one to which we had succeeded when sovereignty over the lands in question was ceded to the United States. In effect the Supreme Court sat as a Mexican court passing on Mexican law' (*Banco de Espana* v. *Federal Reserve Bank*, *Annual Digest*, 1938–40, Case No. 6). However, in a sense any municipal court applying foreign law takes the place of a court of the foreign State.

legislation of Spain, and whether they will be confirmed or annulled. . . .'.[19] In Germany the validity of a naturalisation in the United States was examined by reference to the fact that the decree of naturalisation was subject to review by American courts.[20] There are no similar precedents regarding the recognition of foreign State acts which are in conflict with international law, presumably because, until recently, municipal law which violated international law was universally recognised as valid within the State where it was enacted.[21] But there would seem to be no difficulty in applying, in that connection, the same principles as those recognised to apply to foreign acts in violation of the foreign constitution.

Thirdly, municipal courts may refuse to recognise the effects of foreign State acts which conflict with international law, but which are regarded as valid in the country where they are consummated, on the ground that they are repugnant to the 'public policy' of the forum. They may do so by reference to the argument that the foreign act, although consummated on foreign territory, where its validity is unchallenged, is of such a nature that it cannot be regarded as a legal act by the courts of civilised countries.[22] Traditionally that view has found its application in cases where the foreign law created a continuing status which, itself, was repugnant to the public conscience. As examples of such cases there may be mentioned the status of slavery, disabilities arising from racial legislation, or, in the opinion of the courts of some countries, the status of marriage as created by Soviet law prior to 1944, which was terminable at the will of either party.[23] But the application of that view has been extended, in the practice of courts, to single State acts which have exhausted their effects on the foreign territory. Thus French courts repeatedly refused to recognise title to property which was based on a grant by Spanish authorities, and had come into the possession of the latter as a result of measures of expropriation, on the ground that 'French courts may not recognise any

[19] *Annual Digest*, 1935–7, Case No. 68.

[20] *Juristische Wochenschrift*, 1915, p. 583. Italian practice would appear to be hesitating: see Fedozzi, in *Hague Recueil*, 27 (1929), at p. 199, n. 3. For a Belgian case see *Pasicrisie Belge*, 1909, II, 175. For a decision of the Dutch Court of Cassation see Van Praag, *Juridiction et Droit International Public* (1915), p. 314.

[21] In the United States State legislation which conflicts with the treaty obligations of the Federations has long been regarded as void. See, for instance, *Antosz* v. *State Compensation Commissioner* (1947) 43 S.E. 2d. 397; *People* v. *Oyama* (1948) 332 U.S. 633. The same is true of cantonal law in Switzerland. See, *e.g.*, BGE 24, I, p. 318. However, until the enactment of new Constitutions in several countries, following upon the Second World War, the legislation of 'sovereign' legislatures was universally regarded as valid.

[22] See Cheshire, *Private International Law* (3rd ed. 1947), pp. 192–3.

[23] See a decision of the Supreme Court of Hungary, reported in *Annual Digest*, 1927–8, Case No. 19. See also *ibid.*, 1925–1926. Case No. 22 (note). Contrast *Nachimson* v. *Nachimson* [1930] P. 217.

divestment of a right of ownership, except with the consent of the owner, without just and previous indemnity '.[24] The same principle could, conceivably, be applied to foreign law which violates international law. One instance of this is provided by the old English case of *Wolff* v. *Oxholm*,[24a] an action, in England, on a debt governed by Danish law, in which a discharge granted to the debtor on Danish territory was disregarded on the ground that it was ' not conformable to the usage of nations '. Municipal courts may also invoke the concept of ' public policy ' by reference to the fact that the foreign law violates the interests of the State of the forum.[25] That principle is of particular interest in connection with foreign law which is in conflict with international law, for the State of the forum is likely to have a direct, or, at the least, an indirect interest in the due observance of international obligations.

However, the exclusion of foreign law by reference to the ' public policy ' of the forum, in cases where the courts are required not to enforce that law—as they do in a category of cases presently to be dealt with—but merely to recognise that that law has had certain effects on the territory of the foreign State concerned, is open to considerable objection. For it is generally acknowledged that courts should act always by reference to the consideration that their action, if it is to have authority, must be effective. They cannot, in cases of this nature, deny that the legal act has taken place.[26] A refusal to recognise its effects may in certain circumstances be productive of great hardship. In particular, the unsatisfactory results of the application of ' public policy ' in this matter have made themselves felt in connection with denationalisation decrees. It would seem that these must be considered to take effect within the legislating State even if the persons affected are elsewhere, for essentially denationalisation consists in a rupture, on the part of the State, of the relationship between itself and the denationalised individuals rather than in a change in the personal

[24] *Société Potasas Ibericas* v. *Nathan Bloch*, decided by the Court of Cassation, *Annual Digest*, 1938–40, Case No. 54. See also *ibid.*, Case No. 10; *ibid.*, 1935–7, Case No. 68. Contrast the decision, on the identical issue, of a United States Court in *The Navemar*, *ibid.*, 1938–40, Case No. 68, at p. 182. See also a Dutch decision (*ibid.*, 1919–42, Case No. 7), in which an argument based on Dutch public policy was rejected, not as a matter of principle, but because the foreign law in question was not, in the view of the court, at variance with what should be permissible to a foreign legislature.

[24a] (1817) 6 M. & S. 92.

[25] See Cheshire, *op. cit.*, pp. 191–2; Neumeyer, *Internationales Verwaltungsrecht*, 4 (1936), p. 233.

[26] See, for an emphatic assertion of this, *Kleve* v. *Basler Lebens-Versicherungs-Gesellschaft in Basel*, decided by the Supreme Court of New York in 1943 (*Annual Digest*, 1943–5, Case No. 2).

status of the latter, although that is its consequence. In *Levita-Mühlstein* v. *Département féderal de justice et police*[27] the Swiss *Bundesgericht* refused to recognise the effect of German denationalisation decrees, based on German racial policy, on the ground that they were contrary to Swiss public policy and Swiss conceptions of justice in that they violated the principle of equality before the law.[28] The case concerned the claim of a Swiss woman, married to a former German national, to the retention of her Swiss nationality on the ground that, her husband being now stateless, she had acquired no other nationality on marriage. The effect of the decision was to make the claimant stateless, seeing that, from the point of view of German law, the husband had effectively lost German nationality. The judgment was expressly overruled by the later decision in *Rosenthal* v. *Eidgenössisches Justiz-u. Polizeidepartement.*[29] It may be contrasted, moreover, with an earlier decision of the same court in the case of *Lempert* v. *Bonfol.*[30] In that case the effect of Soviet denationalisation decrees was challenged on the ground that, by withdrawing Russian nationality from large numbers of persons resident in other States and making them burdens on the States concerned, the decrees violated international law and were thus offensive to Swiss public policy. The court held that the effect of the decrees on the nationality of the appellant could not be disputed. While prepared to admit that they might constitute a breach of duties towards other States, the court considered that, as it was not in a position to compel the former home State to revoke the deprivation of citizenship and receive back the person affected, such a finding would not alter the fact that he was stateless.[31] The application of 'public policy' need not, however, be rigidly excluded

[27] BGE 72 (1946), I, 407. The court did not draw a distinction between the enforcement and the recognition of foreign law. Indeed, it held that the provisions in question could not be 'applicable' in Switzerland.

[28] See also *The King* v. *The Home Secretary, ex p. L.* [1945] 1 K.B. 7, in which recognition was denied to a German denationalisation decree on the ground that it conflicted with British interests in time of war. It is believed that the aims of the court, namely, to give the executive a power of surveillance over former German nationals, could have been achieved in another manner. This view is supported by Fawcett in a penetrating analysis of the case in *British Year Book of International Law*, 23 (1946), pp. 378–80. But the exceptional circumstances may make the decision more defensible than it would otherwise have been. For a detailed discussion of that case and the Swiss case mentioned above see also Lauterpacht, in *Jewish Yearbook of International Law 1948*, pp. 164–186.

[29] BGE 74 (1948), I, 346.

[30] *Annual Digest*, 1933–4, Case No. 115.

[31] See also the decision of a French court in *Stern* v. *Proc. de la République* (1917), *Clunet*, 45 (1918), p. 238. In that case the court was required to determine the nationality of the petitioner for the purpose of deciding whether he was subject to legislation relating to enemy property. It was established that, while of German origin, he had become naturalised in the United States, and that Germany was by treaty bound to recognise the naturalisation. It was

in cases of this category. While unsuitable in the vast majority of cases, it is possible to conceive of circumstances in which that concept could come into play. If, for instance, the nationality of a person were in question before a municipal court, and there had been an illegal naturalisation of the kind examined by an international tribunal in the *Georges Pinson Case*,[32] the court might refuse to recognise the existence of that nationality.

III

The Enforcement of Foreign Legislation and Administrative Decrees in the Territory of the State of the Forum

In cases where the foreign law takes effect outside the State of the forum, courts are not always in a position to prevent an illegality from producing legal effects extending to their territory. The position is entirely different in cases where the courts of the forum are required to give 'extra-territorial' operation to the legal acts of a foreign State. In such cases municipal courts are required to apply foreign law to persons and objects [33] under their protection. They have a duty not to enforce,[34] in relation to these persons and objects, foreign decrees which, in their eyes, are illegal or immoral.

In this connection, also, there is no warrant for regarding

admitted, however, that Germany, nevertheless, made expatriation subject to certain conditions which had not been fulfilled in the case under review. The court disapproved German practice in that respect, holding that it derogated from Germany's international obligations, and concluded that it could only apply the provisions of the treaty, according to which the petitioner's naturalisation must be recognised. It may be, nevertheless, that Germany still regarded the petitioner as its national, and that it still exercised a certain authority over his person or property. In that case the decision hindered the aim of French war legislation.

[32] *R.G.*, 39 (1932), pp. 432–3.

[33] McNair, *Legal Effects of War* (3rd ed. 1948), questions whether an English court will ever enforce upon property in England rights claimed under a foreign law or decree purporting to have extra-territorial effect, seeing that according to the rules of the English conflict of laws title to property is governed by the *lex rei sitæ*. There is no direct authority on the subject. An example of an American court giving effect to such a decree is provided by *Anderson* v. *N. V. Transandine Handelsmaatschappij*, *The State of the Netherlands Intervening* (28 N.Y.S. 2d. 547). See also, for a review of some United States authorities on the subject, *Annual Digest*, 1941–2, Case No. 172. And see, for a recent English decision, *Lorentzen* v. *Lydden* [1942] 2 K.B. 202. McNair, *op. cit.*, p. 372, suggests that that case shows how slight the distinction between extra-territorial legislation relating to persons and that relating to property can become. For a Swedish decision see *The Rigmor*, *Annual Digest*, 1919–42, Case No. 63, a case of a requisition of a merchant vessel; it may be that special rules apply to these (see McNair, *op. cit.*, pp. 377–82).

[34] 'Enforcement' may mean recognition of the fact that foreign legislation can have application to persons or property on the territory of the State of the forum, or, more restrictively, the utilisation of the process of the court to give effect to foreign law. Possible practical consequences arising from that distinction will be discussed below. Here 'enforcement' is taken to cover both categories of cases.

foreign law as applicable in circumstances where international law imposes a limitation on the legislative competence of the foreign State. However, the power of excluding it is of little practical importance. In most cases the law excluded by rules of public international law would also not be applicable according to the principles of the conflict of laws. Thus in the *Amand Case* [35] Caldecote C.J., in passing, examined the question whether the State of the Netherlands was competent, by international law, to enact legislation conscripting its nationals resident abroad. It is not clear whether he was referring to public international law or so-called private international law [36]; it would appear that the rules of either would have produced the same result. Similarly, the rule of public international law which limits the power of the State to confer its nationality on aliens resident abroad would seem to be merely a reiteration of the wider principle that a State cannot legislate with effect binding upon persons who have no territorial or personal connection with it. That rule has been relevant in connection with the question whether the repeal, by the Allied Control Council in Germany, of German racial legislation reimposed German nationality on persons, resident abroad, who had been denationalised by that legislation and were thus no longer under Germany's personal jurisdiction. Not all foreign courts faced with that question have taken account of the rule limiting the legislative competence of Germany in the matter.[37] Where they have done so they have stated, in general terms, that the legislation of the Allied Control Council can have no extra-territorial effect, without indicating whether that conclusion is the result of the application of principles of public or of 'private' international law.[38]

[35] [1941] 2 K.B. at 254. It is not clear whether the Dutch law was tested on this point by reference to the view that it would not have been recognised by Dutch courts, or on the ground that the court could only apply the foreign law where, by international law, the foreign State was competent to legislate.

[36] The learned judge quoted both Dicey's *Conflict of Laws* and Oppenheim's *International Law*.

[37] In *Kurzmann* v. *O'Rea* (*Dalloz hebd.* 1947, p. 61) the French Court of Cassation held that the Allied legislation had 'imposed' German nationality upon refugees, resident abroad, who were former German nationals. See also *ibid.*, *Sommaires*, pp. 14 and 21. And see *Levita-Mühlstein* v. *Département fédéral de justice et police*, BGE 72 (1946), I, 407.

[38] See *Lennhof* v. *Brach*, decided by the Court of Appeal of Colmar on July 21, 1948 (*Gazette du Palais*, 1948, 2e sem., p. 110); *Rosenthal* v. *Eidgenössisches Justiz und Polizeidepartement*, decided by the Swiss Federal Tribunal on October 8, 1948 (BGE 74 (1948), I, p. 346). The phraseology of the Swiss decision suggests that the judgment of the court may only have amounted to a finding that the Allied legislation was not intended to have extra-territorial effect. Thus the court said that 'The assumption that . . . the denationalised German citizens would, without more, recover German nationality, has not been borne out by the facts' (at p. 351).

Courts have also, in this connection, reviewed foreign legal acts in the light of higher legal rules in cases where lack of conformity with these rules may affect their validity. It has been submitted above that municipal courts must examine foreign legal acts in this way even where these acts took effect wholly on foreign territory, in order to determine whether they are capable of producing legal effects. Courts have done so even more readily where it has been sought to give the foreign law application within their jurisdiction. In the English case *Re Amand* a Divisional Court on two occasions [39] examined the validity of a Dutch decree enacted by the Netherlands Government in exile, in the light of the principles, mainly of the Constitution of the Netherlands, but also, in passing, in the light of international law. The court, in following this course, was influenced by the consideration that Dutch courts had ceased to function and that English courts were thus the only courts in a position to investigate the validity of the decree. But one ground of the decision was stated, by reference to more general principles, by Wrottesley J. in the second *Amand Case* [40]:

> 'The rule which prevents a court from pronouncing to be invalid some act which may nevertheless be invalid by the law of the State which made it is justified on many grounds, but principally on the great advantage which flows from the recognition on the part of every civilised State of the rights of every other civilised State to deal with persons and property inside its own territory. That reasoning does not apply to an act of a foreign country which deals with the personal freedom of a person living in this country within the protection of the Crown'.

In *Government of the Kingdom of Belgium* v. *The Lubrafol* [41] a United States District Court refused to consider that a Belgian requisitioning order had effected a change of ownership of a vessel which was at all material times within the territory of the United States. The main ground of the decision was the fact that the order did not constitute a valid requisition under Belgian law.

[39] [1941] 2 K.B. 239; [1942] 1 K. B. 445. See also *Lorentzen* v. *Lydden* [1942] 2 K.B. 202.

[40] [1942] 1 K.B. at 449. See also Croom-Johnson J., *ibid.*, at p. 452, although that learned judge pointed out that such an examination might be a breach of international comity, by reference, apparently, to the principle of *Oetjen* v. *Central Leather Co.*, *supra*. In an analogous South African case, *Haak* v. *Minister of External Affairs* [1942] S.A.L.R.App.Div. 318, the court refused to examine the validity of the Dutch decree.

[41] *Annual Digest*, 1941–2, Case No. 37. The court did not discuss the question whether the requisition was otherwise enforceable. See also *Fields* v. *Predionica I Tkanica A.D.*, *Annual Digest*, 1941–2, Case No. 55.

However, the distinction between this category of cases and that previously discussed is primarily of importance with regard to the operation of 'public policy'. The public policy of a State must be of relevance, essentially, in relation to the law applied by its courts to persons or objects within its territorial jurisdiction. In this category of cases courts are applying foreign law to persons or goods within their jurisdiction. They must be free to exclude law the enforcement of which is not in the public interest of the State. By reference to such considerations courts of many countries have refused to enforce, *inter alia*, foreign law which they regard as offensive to their political or social institutions, or their notions of justice and morality.[42] It is fitting that courts should regard as being within that category foreign legal acts which are contrary to international law. There are several instances of courts taking such a course. In the case of *M.* v. *Aktieselskabet K.H.*,[43] decided in 1934, the German *Reichsgericht* held, in an action by a German subject, the owner, before the first world war, of a firm in France, against a Danish bank for moneys due to the French firm which had been paid to a French administrator authorised by French war-time legislation to receive payment on behalf of the firm, that the French legislation could not give a right to assets abroad, and could therefore not give a sound defence to the Danish bank, on the ground that it violated the principle of international law, accepted by Continental States, that private property is immune in time of war. Similarly, in two Swiss cases the *Bundesgericht* refused to apply, to claims arising out of a contract of carriage of goods by rail, French legislation limiting the liability of French railways. The *Bundesgericht* did so on the ground that the legislation in question conflicted with a Franco-Swiss Convention on the subject.[44]

Finally, an example from the realm of nationality legislation suggests that there may be yet another method, falling short of the condemnation of foreign legislation in the light of the public policy of the forum, of excluding foreign law which conflicts with

[42] For a recent example see a decision by the Court of Appeal of Paris of October 29, 1949 (*Revue Critique de Droit International Privé*, vol. 38 (1949), p. 650). The court refused to recognise the right of an 'aryan' administrator, appointed in Czechoslovakia in pursuance of German racial legislation, to wind up the property of a Czech firm in France, on the ground that 'la législation raciale allemande introduite en Bohème et Moravie par le Protecteur du Reich . . . se trouve contraire à l'ordre public national et international . . . au même titre que ce serait une loi autorisant la traité des nègres et des esclaves'.

[43] *Annual Digest*, 1933–4, Case No. 217. The contract between the parties was governed by Danish law, but the person authorised to receive payment on behalf of the French firm was to be designated by French law.

[44] *Baumann* v. *Im Obersteg & Cie* (1922) BGE 48, II, 260; *Eisenbahnen in Elsass-Lothringen* v. *Bronner & Cie* (1923) BGE 49, II, 361.

international law. Reference has been made above to the view, held by some courts, that the repeal by the Allied Control Council in Germany of German racial legislation reimposed German nationality on persons, resident abroad, who had been denationalised by that legislation. That view is open to objection on two grounds. In the first place, it has been pointed out above that the legislation of the Allied Control Council could not affect persons who were neither under Germany's personal nor under her territorial jurisdiction. Secondly, there is probably a rule of international law that States may not impose their nationality upon individuals who do not wish to acquire it. In *Terhoch* v. *Daudin*,[45] decided in 1947, the Court of Appeal of Paris fully recognised the existence of that principle. Proceeding on the assumption that the Allied Control Council could not have intended to violate international law, it construed the Allied legislation in such a manner as to make it inapplicable to refugees who did not intend to return to Germany. The court interpreted the intention of the Allied Control Council correctly. But, in a subtle manner, it was refusing extra-territorial operation to foreign legislation by reference to a rule of international law. It has been seen, in connection with the policy of municipal courts of interpreting the legislation of their own State so as to accord with international law, that legislation rarely expressly violates international law. It is, then, possible that municipal courts, in dealing with the legislation of other States, may, by adopting the same policy, be able, in many cases, to enforce the foreign law in such a manner and to such an extent that a conflict with international law is avoided.[46]

It has been suggested, by reference to foreign law having extra-territorial effects upon nationals of the legislating State, that there is a distinction, in respect of the power of courts to exclude foreign law which would normally be applicable, between recognition of the applicability of foreign law and enforcement of that law in the narrow sense.[47] If it is true also of foreign law purporting to affect property within the jurisdiction of the State of the forum—and some passages in United States decisions suggest that it may be [48]—that distinction may produce a difference between actions in which persons who have acquired a title to property within the jurisdiction under foreign law seek the aid of the court for the purpose

[45] *Dalloz hebd.*, 1947, p. 240.

[46] For instance, in the two Swiss decisions cited above in connection with the application of 'public policy', the aim of the court would have been fully achieved if it had held that the French legislature must have intended to preserve existing treaty obligations.

[47] McNair, *Legal Effects of War* (3rd ed. 1948), p. 374.

[48] See, *e.g.*, *Ervin* v. *Quintanilla*, *Annual Digest*, 1938–40, Case No. 76, at pp. 223–4; *Anderson* v. *N. V. Handelmaatschappij*, *ibid.*, 1941–2, Case No. 4.

of recovering it, and cases in which they seek to protect that right, peacefully made effective, against the claims of other parties. However, that difference probably arises only in cases where the objection to the enforcement of the foreign law is directly connected with the utilisation of the process of the courts of the forum by a foreign State, as in the case of foreign penal, confiscatory or revenue laws. It should not apply in circumstances where the foreign law is excluded because of its obnoxious character. There are cases of courts refusing recognition to foreign law, on the ground of its incompatibility with international law, even where it had taken effect.[49] In any case, it is clear that courts will not recognise rights acquired under foreign law where the taking of possession within the jurisdiction has itself been achieved in such a manner that it constitutes a violation of international law. Thus in *The Rigmor*[50] a Swedish court, while fully recognising the possession taken of a Norwegian vessel in Swedish waters in pursuance of a Norwegian requisitioning decree, held that, had possession been acquired under compulsion (and thus in a manner involving an infringement of Swedish sovereignty), the injured party would have been entitled to receive legal assistance from Swedish authorities.[51] The same principle was held by an American court to be applicable to cases where the foreign law is forcibly given effect within the jurisdiction of a third State.[52, 53]

IV

Foreign Judgments

The position of foreign judgments is somewhat different from that of foreign legislation and executive decrees. While the courts of the forum may, in a proper case, examine the validity of the latter with reference both to their substance and to the competence of the organ responsible for them, municipal courts will not question a foreign judgment on its merits[54]; the question of the competence of the court can alone be raised. On the other hand, it is in particular with regard to the jurisdiction of courts that limitations

[49] See, *e.g.*, *M.* v. *Aktieselskabet K.H.*, *Annual Digest*, 1933–4, Case No. 21.
[50] *Annual Digest*, 1941–2, Case No. 63.
[51] See also the United States decisions in *The Navemar*, 24 F.Supp. 495, 497; and *Ervin* v. *Quintanilla*, 99 F. 2d 935. In all these cases the question at issue was merely the right to possess the vessel; the plea of sovereign immunity precluded an examination of the title to the property.
[52] *Fields* v. *Predionica I Tkanica A.D.* (*No. II*), *Annual Digest*, 1941–2, Case No. 55.
[53] Analogous cases are provided by decisions of the courts of neutral States releasing prizes taken or brought by a belligerent within their jurisdiction. See *The Santissima Trinidad*, 7 Wheat. 283; *The Steamship Appam*, 243 U.S. 124.
[54] See *Pemberton* v. *Hughes* [1899] 1 Ch. 781; Beale, *Treatise on the Conflict of Laws* (1935), pp. 1375–6.

upon the competence of States imposed by public international law have been of importance.[55] Municipal courts appear to have examined these, both in cases where they are required to recognise the effects of the foreign judgment on its own territory, and in cases where they are seized of an action for the enforcement of an unsatisfied foreign judgment, irrespective of whether the lack of competence would invalidate the foreign judgment in the State where it was delivered.

The question has arisen, in the first place, in connection with the constitution of the court itself. There seems to be little doubt that municipal courts will not recognise the judgments of foreign courts which have been set up in violation of international law. Thus, in *The Flad Oyen*,[56] decided in 1799, Lord Stowell refused to recognise the title of a neutral national in a vessel which had been condemned by and sold under the process of the French consul in Bergen in violation, in the view of the court, of the neutrality of Denmark and of international law. Similarly, the German *Reichsgericht* refused to regard as *res judicata* judgments delivered by French courts in the Ruhr district during the occupation of that area from 1923 to 1924, on the ground that the occupation was illegal under international law, and that jurisdiction arrogated in contravention of international law could not affect the jurisdiction of German courts over cases otherwise within their competence.[57]

Secondly, municipal courts may deny that a lawfully constituted court had jurisdiction in the particular case concerned. This aspect is of particular importance in connection with cases in which foreign courts have exercised jurisdiction over persons or property seized in violation of international law. The attitude of courts in this matter has been somewhat hesitant, apparently because they have been uncertain whether an examination of the circumstances of the seizure relates to the competence of the court, or to the merits of the decision.[58] But it is difficult to see why there should be such doubts. It is stated in Dicey's *Conflict of Laws*,[59] by reference to the principle of the conflict of laws that a court is only competent

[55] Here, again, however, limitations imposed by public international law and restrictions on the competence of States as defined by the rules of the conflict of laws by reference to the principle of effectiveness overlap.

[56] 1 C.Rob. 134. Even apart from the question of neutrality, it seems doubtful whether a governmental agency, established abroad, could have jurisdiction, in the legislative or judicial sense, over the persons and property of aliens.

[57] *Annual Digest*, 1929–30, Case No. 49. The case is not, perhaps, a good example, for, if the occupation, as such, was regarded as illegal, the French authorities there should have been regarded as an unrecognised government—a special problem which has been deliberately left aside here.

[58] See, *e.g.*, Marshall C.J. in *Rose* v. *Himely* : ' It is a question of serious difficulty whether the situation of the particular thing on which the sentence has passed can be inquired into ', (1808) 4 Cr. 241.

[59] 5th ed. by Keith (1932), pp. 446–7.

to give a judgment in rem against property within its jurisdiction, that a judgment given after the arrest of a vessel outside territorial waters would be invalid. Generally, where a court considers the question whether a foreign court was competent, according to the rules of the conflict of laws, to give a judgment which should be recognised abroad, it must examine, on the merits, whether the person or property whose status was affected thereby was properly subject to the jurisdiction of the foreign court. The same principle must be held to apply in cases where there is a seizure in violation of international law, for a court can have no jurisdiction over persons and property which have been brought within the territorial limits of the State as a result of a violation of the law of nations.[60] That was the conclusion of the Supreme Court of the United States in the case of *Rose* v. *Himely*.[61] Refusing to recognise that title in an American vessel, which had been seized by a French vessel on the high seas and had been condemned for a violation of French legislation relating to intercourse with rebel colonies, had passed as the result of the judgment, the court held that ' if a court exercises a jurisdiction which, according to the law of nations, its sovereign could not confer . . . [its sentences] are not to be regarded by foreign courts '. The decision of the same court in the later, essentially similar case of *Williams* v. *Armroyd*,[62] to the effect that courts of the United States could not examine the validity of a foreign judgment in such circumstances, would seem to have been based on a misinterpretation of the intervening decision in *Hudson and Smith* v. *Guestier*.[63] In any event, the Supreme Court continued, in other circumstances, to refuse recognition to judgments which had been vitiated by an illegality in the seizure. Thus in the case of *The Estrella* [64] it ordered to be restored to the original owner a vessel which had been condemned in prize after seizure by a Spanish privateer which had been fitted out in violation of the neutrality of the United States. The question of the competence of the foreign court is also of importance in connection with the immunity from jurisdiction, established by international law, of various representatives of foreign States and, in particular, of diplomatic envoys. In the case of *Société Energie Electrique du Littoral*

[60] See, *e.g.*, the decision of the Supreme Court of the United States in *The Mazel Tov*, *Annual Digest*, 1931–2, Case No. 1.

[61] (1808) 4 Cranch 241.

[62] (1813) 7 Cranch 423.

[63] 6 Cranch 281. In that case the seizure was not effected in violation of international law. The sole point decided referred to the right of a French court to condemn property which was, at the time of the judgment, lying in the port of a third State. In *Williams* v. *Armroyd* the distinction between the earlier case and the case before the court, in which the seizure was made on the high seas, was not discussed in the judgment.

[64] (1819) 4 Wheat. 298.

Méditerranéen v. *Compagnia Imprese Elettriche Liguri*[65] the Italian Court of Cassation refused to grant an *exequatur* to a French judgment for damages for breach of contract against an Italian firm on the ground that the action had impleaded the Italian State and that international law prohibited the French court from exercising jurisdiction in that circumstance.

It is mainly by reference to the incompetence of the foreign court that municipal courts may, in this connection, uphold the authority of international law. However, some distinction should, here also, be drawn between the recognition of the foreign judgment, and its enforcement by the courts of the forum against a person within the jurisdiction by way of an action instituted on the foreign judgment. It would seem to be recognised that the enforcement of a foreign judgment may be refused on the ground that it is obnoxious to the public policy of the forum[66] or that it violated the principles of natural justice, despite the general rule that a foreign judgment may not be examined on its merits. This principle might, without unduly offending against the rules of international comity in the matter, be extended to cover judgments which are manifestly in conflict with international law.

V

CONCLUSION.

All the methods, discussed above, whereby municipal courts may exclude foreign law which is contrary to international law, are those normally employed by them to test the applicability of foreign law in the light of their rules of the conflict of laws. Thus where the foreign State, according to these rules, lacks competence to legislate or to adjudicate, foreign law and foreign judgments will be wholly disregarded. Where foreign laws or foreign judgments are in any manner obnoxious to the public policy of the forum they will be excluded. And it has been shown above that the review of foreign law in the light of superior legal principles has found its application in relation to foreign law which is violative of constitutional law. There is, then, nothing revolutionary in the suggestion that municipal courts may employ these means to exclude foreign law on the ground that it is contrary to public international law.

Nor is the power so to exclude foreign law of merely academic importance. In the first instance, it limits the sphere of operation

[65] *Annual Digest*, 1938–40, Case No. 47.
[66] Beale, *Treatise on the Conflict of Laws* (1935), p. 1412; *Re Macartney* [1921] 1 Ch. 522.

of municipal law which violates international law. Secondly, it may operate as a deterrent. Thus, to give one example, knowledge that title to property, acquired from a government which has been guilty of an unlawful expropriation of alien property, is persistently disregarded by foreign courts, may lead to an embarrassing lack of confidence, on the part of the business community, in that government. Finally, the attitude implied in the exercise of the power of excluding foreign law which violates international law is itself of significance. It demonstrates that, however great the respect of courts for the official acts of foreign States may be, that respect is limited by the overriding concern for the authority of international law.

CONFISCATION, EXPROPRIATION AND THE CONFLICT OF LAWS

I

CONFISCATION of the property of political opponents, nationalisation of heavy industry, and requisition necessary for the conduct of war have followed one another almost without interruption during the last three decades and give rise to a number of legal problems. Within the province of the Law of Nations they give rise to international responsibility. International liability is incurred by a State which discriminates against aliens or deprives them of the minimum protection incumbent on members of the international community. With the exception of the difficulties inherent in the determination of that minimum standard, the rules regarding international responsibility are fairly well established.[1] The same cannot be said of the liability which a State may incur through its treatment of its own nationals. This is new ground upon which it is not as yet possible to state precise and binding rules of law.[2]

In Private International Law the problems raised by confiscation and expropriation take on another aspect. The nationality of the persons suffering from confiscatory measures will as a rule be immaterial here, while the situation of assets at the time of confiscation or expropriation will be of the utmost importance. Only the general and permanent aspects of the question will be examined here, and not those raised by the war-time measures taken by an occupying power,[3] post-war restitution laws, or the division of Germany into zones.[4]

The problem will be clarified if the words used are defined at the outset. By confiscation is meant the taking of property without adequate compensation, by whatever method it may be carried out or cloaked. Expropriation on the other hand is the taking or use of property by public authority with adequate compensation; for example, the compulsory purchase of land and the requisitioning of property. Nationalisation, a word commonly used in recent years with regard to industrial undertakings, may

[1] See Oppenheim–Lauterpacht, *International Law*, 7th ed., vol. I, §§ 151–165b.
[2] See Oppenheim–Lauterpacht, *op. cit.*, §§ 340k–340l.
[3] See Niboyet, *Traité de droit international privé français*, t. IV, § 1216 bis.
[4] A discussion of this problem is to be found in W. Lewald, *Wirkungen der Enteignung durch einen fremden Staat* (Sonderdruck aus den Deutschen Landesreferaten zum III. Internationalen Kongresz für Rechtsvergleichung).

be either confiscation or expropriation according as compensation is or is not given. The following pages will be devoted almost entirely to confiscatory measures in view of their greater practical importance; the problem of the foreign effects of expropriation and requisition will be dealt with separately. Numerous decisions have been delivered in various countries, all stating that confiscatory measures can have no effect upon property abroad.

In England it was decided by the leading case *Folliott* v. *Ogden*,[5] that a confiscation of property enacted by the Legislature of New York could have no effect in England. In later cases recognition was likewise refused to Danish seizure of British property in contemplation of war,[6] a French decree taking over the property of the Carthusian monks,[7] the Soviet nationalisation measures [8] and the confiscation of the property of the ex-King of Spain by the Republican Cortes.[9] But on the other hand a recent war-time decision in England has granted extra-territorial effect to a decree of the Norwegian Government requisitioning merchant ships.[10] In that case the curator appointed by the Norwegian Government was held entitled to claim possession of a ship lying in English waters at the date of the decree.

The Spanish 'sentence' confiscating the ex-King's property also came for examination before the Italian courts. They refused to apply it to property situated in Italy, reaching the same conclusions as the English courts.[11]

In France the doctrine of the non-recognition of foreign confiscatory measures was accepted by the Cour de Cassation, first with regard to Soviet nationalisation measures,[12] and later with regard to measures taken in Spain during the Civil War.[13]

In the United States the courts first refused to recognise Russian nationalisation decrees on the ground that the Soviet Government, which had enacted them, had not been recognised by the United States,[14] and when recognition was accorded on the ground of public policy.[15] But in 1942 a different decision

[5] (1789) 3 T.R. 726.
[6] *Wolf* v. *Oxholme* (1817) 6 M. & S. 92.
[7] *Lecouturier* v. *Rey* [1910] A.C. 262.
[8] *The Jupiter* (No. 3) [1927] P. 122.
[9] *Banco de Vizcaya* v. *Don Alfonso de Borbón* [1935] 1 K.B. 140.
[10] *Lorentzen* v. *Lydden* [1942] 2 K.B. 202.
[11] Trib. Roma, May 26, 1933, *Nouvelle Revue de Droit International Privé*, 1934, p. 722; Corte d'Appello Roma, June 6, 1934, quoted by Fedozzi, *Diritto internazionale privato*, p. 661.
[12] Cass. Req., March 5, 1928, *Clunet*, 1928, p. 674.
[13] Cass. Civ., March 14, 1939, *Sirey*, 1939-1-182.
[14] *E.g.*, *Banque Internationale de Commerce de Petrograd* v. *National City Bank*, *Clunet*, 1939, p. 782.
[15] *Cie des Chemins de Fer Vladikavkazy* v. *New York Trust Company*, quoted by Scheftel, *Clunet*, 1938, p. 453.

was rendered but on special facts. By the so-called Roosevelt-Litvinov Agreement, 1933, the U.S.S.R. had assigned to the U.S. all its claims against U.S. nationals. The Supreme Court held that the U.S. Government had by that Agreement become entitled to the property of a Russian insurance company in the U.S., since the Russian nationalisation decrees acquired extra-territorial effect by operation of the international agreement of 1933, which was in the United States *suprema lex*.[16]

This decision was strongly criticised and in later decisions, concerned with the effect of confiscatory measures not covered by the Roosevelt-Litvinov Agreement, the Supreme Court reverted to a doctrine of strict territoriality.[17]

However, requisition of property ordered during the war by the Dutch Government in 1940 as a conservatory measure to avoid enemy seizure, was held to extend to assets situated outside Dutch territory.[18]

In the Netherlands the claims of the French liquidator of the Carthusian Congregation failed in the same way as they have elsewhere.[19] Later the claims of the 'Treuhänder' or 'Kommissarische Verwalter' appointed by the German National-Socialist Government likewise failed when they wanted to get hold of the Dutch property of German Jews or 'political enemies'.[20]

In Austria the courts recently insisted on the purely territorial character of Czechoslovak nationalisations.[21] The same territorial character was ascribed to the confiscation decreed in Bavaria of the property of a dissolved National-Socialist organisation, the Austrian Supreme Court deciding that assets situated in Austria escaped the Bavarian confiscation and that their fate could only be settled by Austrian Law.[22]

In Belgium the oldest reported decision was given in the case of the Carthusian monks. As in other countries, the claims of the French liquidator failed.[23] The Belgian courts have likewise turned down the claims of German *Verwalter* to the property of Jewish refugees. More recently, the Brussels *Cour d'Appel* has

[16] *U.S.* v. *Pink, Clunet*, 1940–1945, p. 75; for criticism of that decision see Borchard, *American Journal of International Law*, 1942, p. 275.
[17] *Bollack* v. *Société Générale pour favoriser le développement du commerce et de l'industrie en France*, 33 N.Y.S. (2d) 986 (263 App.Div. 601), *Annual Digest of Public International Law Cases*, 1941–1942, p. 147.
[18] *Anderson* v. *Transandine Handelsmaatschappij*, 36 *American Journal of International Law* (1942), p. 701.
[19] Gerechtshof's Gravenhage, October 28, 1907, *Weekblad van het Recht* 8615.
[20] Rechtbank Amsterdam, January 3, 1940, *Weekblad v.h. Recht* 11002; Rechtbank Rotterdam, October 11, 1939, *ibid.*, 1940, p. 168.
[21] Handelsgericht Wien, June 21, 1948, *Die Wirtschaft*, August 21, 1948.
[22] Oberster Gerichtshof, March 10, 1948, *Juristische Blätter*, 1949, p. 70.
[23] Tribunal de Commerce Bruxelles, June 27, 1911, *Belgique Judiciaire*, 1911, p. 1165.

refused to apply to property situated in Belgium a nationalisation decree enacted by the Soviet authorities in Lithuania.[24]

II

This brief survey shows a quite remarkable measure of agreement. It can be stated that the courts of many countries strongly refuse to allow any extra-territorial effect to measures of confiscation (as distinct from expropriation or requisition).

The meaning of the principle of territoriality of confiscation is best understood in face of the actual extra-territorial ambitions of the confiscating authorities. Quite commonly the confiscating State is not satisfied with the assets to be impounded on its territory but also claims the right to seize assets situated abroad. Such was the scope of the Soviet nationalisation decrees, clearly stated, after certain hesitation, in administrative instructions.[25]

Such was also the scope of the measures taken by the German and Spanish Governments, if one is to judge by the claims put forward in their names in foreign courts.

Only when contrasted with such extra-territorial ambitions do the decisions quoted above have their full meaning. As was aptly remarked by Cheshire, if the principle of the territoriality of confiscating laws were repudiated, 'the value of England as the sanctuary of political refugees would be greatly diminished. The courts would respect their personal liberty but would collaborate in the stripping from them of their means of existence'.[26] This remark, written for England, is true for all Western countries and with regard to all confiscation whatever its political tendency.

Two lines of thought are to be found in the decisions cited. The *ratio decidendi* in the courts may be either the territoriality of public laws, or a rule of public policy.

The doctrine of public policy is sufficiently well known and accepted not to need any special comment here. The same cannot be said however of the principle of the territoriality of laws which are political or penal in character, since opinion is far from unanimous. Prominent scholars of various countries consider this principle established, for example, Arminjon, Cheshire, Lauterpacht, Niboyet and W. Lewald.[27] Others, such as Nussbaum,

[24] Cour d'Appel Bruxelles, June 25, 1947 (*Cie Belgo-Lithuanienne d'Electricité*), *Journal des Tribunaux*, 1948, p. 104.

[25] See Cheatham, *Clunet*, 1940–1945, p. 48.

[26] *Private International Law*, 3rd ed., p. 181.

[27] Arminjon, Les lois politiques et le droit international privé, *Revue de droit international privé*, 1930, p. 389; Cheshire, *op. cit.*, p. 175; Niboyet, *op. cit.*, t. IV, n° 1205 and 1213; Oppenheim–Lauterpacht, *op. cit.*, § 144b; W. Lewald, *op. cit.*, p. 419.

Neumann, van Brakel, doubt its existence,[28] or only admit it with restrictions, such as Martin Wolff.[29] Others again simply ignore it.[30]

The basis of the principle of territoriality is simple. Penal, revenue and political laws are outside the province of Private International Law. The traditional conflict rules presuppose some legal community and hence proceed to a division of competence between the various legislators. But they were not devised for revenue, penal or political laws, which are indeed manifestations of the State's sovereign power, and are part of Public Law; they are therefore necessarily limited to the territory in which that power is effectively wielded. No foreign authority will lend its assistance to enforce them, except by express international agreement.[31]

The general effect of both theories is the same, but the problem will be clarified if the two theories are kept apart and certain differences between them stressed.

III

The role of public policy is to deny any effect to confiscatory measures on the ground that they are inequitable. The question whether a given measure is confiscatory or not depends upon the conditions of each particular case. It is not possible to state a general rule in this respect. The compensation may be inadequate, it may be paid with great delay, or it may be paid into a blocked or non-transferable account. It will be the foreign judge's task to appreciate whether the amount and the terms of compensation are so unjust that they impart a confiscatory character to the expropriation. In that investigation the judge will be guided by the expression in his own law of his country's public policy.

State B may conclude with State A a treaty the effect of which is that its nationals are precluded from asserting that the confiscatory measures of State A are contrary to the public policy of State B. So in the Treaty of Rapallo Germany undertook to recognise the Soviet measure of nationalisation; and in the Roosevelt-Litvinov Agreement, 1933, an overall settlement of claims between the United States and the U.S.S.R. was achieved, and the United States formally recognised the Soviet Government.

[28] Nussbaum, *Deutsches Internationales Privatrecht*, p. 71; S. van Brakel, *Grondslagan en Beginselen van Nederlandsch Internationaal Privaatrecht*, p. 31; R. R. Neumann, *Devisennotrecht und internationales Privatrecht*, p. 31.
[29] *Private International Law*, p. 537.
[30] *E.g.*, Lerebours-Pigeonnière, *Précis de droit international privé français*.
[31] An example of such assistance is to be found in the Brussels Agreement of December 5, 1947, on conflicting claims to German enemy assets.

A more recent example is the seizure, by the Allied Powers, of German assets in neutral countries. Originally this seizure had been authorised by Law No. 5 of the Allied Control Council for Germany; but it seemed certain that neutral countries would refuse to recognise it in their territories. But since extra-territorial operation was essential for Law No. 5 international agreement was reached at Washington between the Allied Powers and certain neutral countries, by which neutral countries undertook to seize all German assets located on their territory.[32]

A new aspect of the problem is to be found in the conclusion of agreements by which a lump sum is paid by State A either to State B or collectively to the nationals of State B affected by the confiscatory measures for later division among the claimants. The question arises whether, as a consequence of that payment, State A's measures are no longer to be considered as confiscatory in effect. It would seem that the courts of State B would still be free to ascertain whether the lump sum is an adequate compensation and, if it is found not to be, to consider State A's measures as confiscatory and contrary to public policy. Even though the agreement included a final renunciation by the claimants, the courts would still be free to ascertain whether their consent had not been given under duress.

Expropriation against adequate compensation is not contrary to public policy. Will it have any effect outside the territory of the expropriating State? Prima facie it seems difficult to accept such a view. Even though adequate compensation is provided, expropriation and requisition always proceed from sovereign right. They are manifestations of the dominion which a State exercises over things situated within its territory.[33] It has, however, been decided more than once in recent years that expropriation or requisition may operate extra-territorially provided they are not contrary to public policy.[34] On the ground of those decisions it has been said that a new rule has been evolved in English and American Law, to the effect that if the foreign State purports to give extra-territorial effect to its measures of expropriation or requisition, such effect will be recognised in English and American courts, provided the expropriation or requisition is not held to be contrary to public policy.[35] But this rule as formulated, is not accepted unanimously. It should be borne in mind that all the

[32] See W. Lewald, *op. cit.*, pp. 429–434.

[33] *Sic* Fedozzi, *op. cit.*, p. 659; Niboyet, *op. cit.*, t. IV, n° 1205 and 1213.

[34] *Lorentzen* v. *Lydden* [1942] 2 K.B. 202, *Annual Digest of Public Int. Law Cases*, 1941–1942, p. 131; *Anderson* v. *Transandine Handelsmaatschappij*, 36 *American Journal* (1942), p. 701; *State of Netherlands* v. *Federal Reserve Bank*, 43 *American Journal* (1949), p. 181.

[35] M. Wolff, *op. cit.*, p. 538.

decisions, on which it is based, were given in respect of war-time measures enacted by the Governments of occupied countries in order to save the foreign assets of their nationals from enemy seizure. It may therefore be submitted that they aimed at solving a particular problem rather than at establishing a general rule. On the other hand, it should be observed that a strictly logical application of the doctrine of territoriality of expropriation and requisition would lead to unsatisfactory results. Consider the case of an industrial undertaking, organised as a company, which is nationalised against adequate compensation. Where the assets owned by that company abroad, such as bank deposits or stocks of materials, have been taken into account in fixing the quantum of compensation, it would be unreasonable to allow the shareholders to claim that the foreign assets have not been affected by nationalisation but remain their property. The question may therefore be asked whether the best solution would not be to bring measures of expropriation and requisition under the general rule of the *lex rei sitæ*. Such measures would then affect an asset situated abroad only if and when it is the property of a corporation domiciled within the jurisdiction of the expropriating State. Should the attitude of the court called upon to pass judgment on the extra-territorial effect of a confiscatory measure be influenced by the nationality of the person affected by it? It often happens that courts, when refusing to recognise a foreign confiscatory law, emphasise that they are doing so in order to protect their nationals.[36] This tendency of the courts to be concerned mainly with the protection of their fellow nationals can readily be understood. It is submitted, however, that the nationality is immaterial in this respect.

If the *ratio decidendi* of the court is the territoriality of political and penal laws, the solution is clear. All assets situated outside the territory of the foreign State escape its grip, whatever the nationality of their owner may be. If, however, the *ratio decidendi* of the court is public policy, all unjust infringements of private property should be considered as being contrary to public policy, even though the victim may be a national of the foreign State. The stress laid upon the nationality of victims is an interpolation of the idea of international responsibility, namely, that the protection of the State can be extended only to its nationals. Such an interpolation seems unwarranted in the province of Private International Law.

[36] See W. Lewald, *op. cit.*, p. 418; also a remark by Wigny, *Belgique Judiciaire* 1939, p. 374; comp. 21 *British Year Book of International Law*, p. 188.

IV

The principle of the territoriality of political and penal laws carries with it the difficulty of the localisation of property. If public policy is invoked, the *situs* of the assets affected by the confiscatory measure is immaterial. Public policy is equally affected by any unjust expropriation, wherever it may be carried out, provided there is some connection with the *forum*. But if the doctrine of the territoriality of confiscatory measures is adhered to, the situation of assets becomes of paramount importance. The effective scope of the measures will vary according as the assets covered by it are or are not wholly situated within the jurisdiction of the confiscating State.

It will be useful to refer to a few examples showing how the problems of *situs* arise in practice.

The case of merchant vessels may be taken first. According to prevalent opinion, the transfer of title to a ship is governed by the law of the flag [37]; but that rule did not prevent the courts from refusing to apply expropriation or requisition decrees to vessels flying the flag of the foreign State but lying outside its territorial waters.[38] Not the flag but the actual location is taken into account.

Secondly the case may be examined of a debt due from a foreign debtor. Two views are held about the law governing the assignment of debts; either the law of the debtor's domicile or the law governing the debt itself may be chosen.[39] But with regard to the expropriation of *choses in action*, there is neither hesitation nor difference of opinion. If the debtor resides outside the territory of the foreign State, the debt escapes confiscation.[40] Thus only the actual residence of the debtor is taken into account.

The legal position of foreign shareholders and creditors of nationalised companies has been discussed in numerous judicial decisions and learned essays. The problem was sharply raised by the Soviet nationalisation decrees. It is still with us in view of the nationalisation carried out, during and after the second world war, in Eastern Europe. The first question to be examined is whether the dissolution of a company in the process of nationalisation will be recognised by foreign courts. In the United States that question was for long answered negatively on account of the

[37] Lerebours-Pigeonnière, *op. cit.*, p. 260; comp. 21 *British Year Book of Int. Law*, p. 187.

[38] *The Jupiter* (No. 3) [1927] P. 122; Cass. France, March 5, 1928, *Clunet*, 1928, p. 674; but *contra*: *Lorentzen* v. *Lydden* [1942] 2 K.B. 202.

[39] See Batiffol, *Les conflits de lois en matiere de contrats*, p. 426.

[40] *Frankfurter* v. *Exner*, *Ltd.* [1947] Ch. 629; Tribunal de commerce Bruxelles, June 9, 1938, *Belgique Judiciaire*, 1938, p. 563.

non-recognition of the Soviet Government.[41] But the prevailing opinion in other countries has been that the dissolution could not be disregarded. Both the creation and the dissolution of a corporation are matters pertaining to its *status* and governed by the law of its domicile.[42] But the dissolution cannot determine the fate of subsidiary companies or other assets belonging to the dissolved corporation. All assets situated outside the territory of domicile continue to be the shareholders' property. This means that they must be administered on behalf of the shareholders even though the company has ceased to exist.

In Austria an administrator is appointed by the administrative authorities to manage the affairs of a subsidiary company belonging to a nationalised foreign company. Where there are non-corporate assets, the courts appoint a curator.[43]

In Belgium the assets of a nationalised foreign company are said to form a *société de fait*, *i.e.*, an unregistered company. If the further pursuit of the corporate objects has become impossible, the courts appoint a liquidator whose task it is to dispose of the assets and distribute the proceeds among the local shareholders.[44] Further, the Belgian estate of a nationalised company is a separate entity distinct from the assets of that company in other countries. Hence the liquidator appointed by a French court is not entitled to take property in Belgium.[45] The liquidation must be organised independently in all countries concerned.

The decisions of French courts are given along the same lines, but the dissolved company is treated as a juristic person for the purpose of its liquidation, provided the *animus societatis* still exists.[46]

In England the winding-up of foreign companies dissolved by nationalisation is carried out in the same manner as the winding-up of English companies. The liquidator of the dissolved company still has a standing in court during the winding-up process.[47]

In Germany the dissolution ordered by the foreign State is likewise recognised.[48] The fate of the dissolved company's German

[41] *Banque Internationale de Commerce de Petrograd* v. *National City Bank*, *Clunet*, 1930, p. 782.
[42] *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* [1933] A.C. 289; Cass. France, July 4, 1933, *Revue pratique des sociétés*, 1933, p. 324; Cheshire, *op. cit.*, p. 152.
[43] Information supplied by Dr. Seidl-Hohenveldern in his Report to the Third International Congress of Comparative Law, London, August, 1950.
[44] Cour d'appel Bruxelles, June 25, 1947, *Re Compagnie Belgo-Lithuanienne d'Electricité*, *Journal des Tribunaux*, 1948, p. 104.
[45] Cour d'appel Bruxelles, July 11, 1938, *Revue pratique des sociétés*, 1939, p. 189.
[46] Cour d'appel Paris, March 29, 1938, *Clunet*, 1938, p. 1017.
[47] *Russian and English Bank* v. *Baring Bros.* [1936] A.C. 405; Cheshire, *op. cit.*, p. 635.
[48] Kammergericht Berlin, October 25, 1927, *Juristische Wochenschrift*, 1928, p. 1232.

assets is settled in much the same way as in England and France.[49] New problems of Interzonal Law have recently been raised by the nationalisation effected in Eastern Germany by the Soviet military administration. It is generally held that the nationalised companies survive in every respect in Western Germany.[50]

This brief summary of the problems of *situs* leads to the following conclusion. The territorial effect of confiscatory measures should not be determined by applying the general rules of Private International Law on the *situs* of goods but solely by taking into account their actual location. All tangible assets located *de facto* outside the territory of the expropriating State escape confiscatory seizure. With regard to intangibles, such as debts, if either the debtor or the creditor resides *de facto* outside the territory of the expropriating State the debt will escape seizure. As for rights of industrial property, such as patents and trade marks, they are an independent creation of each country in which they are granted and will therefore not share the fate of the nationalised company with which they are connected.

It is not difficult to justify the setting aside of the general rules of Private International Law when determining the territorial reach of confiscatory measures. For the question at stake is not the determination of the law applicable to private relations, it is rather the determination of the territorial range of the State's power to command. The question is not one of determining the competent law but of fixing the boundaries of sovereignty which is in this respect a *potestas de facto* rather than a *potestas de jure*. When a tangible or intangible movable is *de facto* situated within the territory of the confiscating State, the confiscatory measure transfers the property in it to the State. But if such a movable is later taken abroad, the question arises whether foreign courts will recognise the transfer that has taken place or will repudiate it on grounds of public policy. The courts will be powerless to adjudicate that question, as long as the movable is in the possession of the confiscating State, since that State, when its title is challenged, can plead immunity from the jurisdiction. The court will have to decline jurisdiction, and this has actually happened on various occasions in England,[51] in Austria[52] and in Belgium.[53]

The factual situation at the commencement of proceedings is

[49] Reichsgericht, May 20, 1930, *Juristische Wochenschrift*, 1931, p. 141.
[50] On this problem see W. Lewald, *op. cit.*, pp. 435–444.
[51] *The Cristina* [1938] A.C. 485; *The Arantzazu Mendi* [1939] A. C. 256.
[52] Oberster Gerichtshof Wien, August 27, 1919, 28 *Niemeyer's Zeitung*, 1920, p. 506, quoted in Dr. Seidl-Hohenveldern's Report.
[53] Cour d'appel Bruxelles, July 7, 1937, *Journal des Tribunaux*, 1938, p. 166; Cour d'appel Bruxelles, January 17, 1938, *Journal des Tribunaux*, 1938, p. 163.

of paramount importance. If the confiscating State is not in possession of the property, which will be the case, *e.g.*, with a ship which has taken refuge in foreign waters, the State will not be able to get possession because the court will refuse to grant any extra-territorial effect to its decrees. If on the other hand the foreign State is in possession of the property, the suit brought against it will have to be dismissed on the ground of its sovereign immunity.[54] The only exception is the case where the foreign State has obtained possession by force.[55] The various decisions given by English courts with regard to Spanish ships are vivid illustrations of the paramount importance of actual possession.

The question may be asked whether the courts ought not to assume jurisdiction by admitting limitations upon the principle of sovereign immunity. In certain countries the courts restrict sovereign immunity to those cases where the foreign State has acted, *jure imperii*, whilst they assume jurisdiction when the State has acted in the field of private law, *jure gestionis*.[56] However, in England, the United States and Germany, to mention only a few countries, that distinction is not recognised and the plea of sovereign immunity is always accepted with only a few well-defined exceptions.

Even if a restrictive theory of sovereign immunity were to prevail, the courts would still be powerless to assume jurisdiction in the case under review; for even though the foreign State puts the confiscated property to commercial use, the subject-matter of the dispute is not the use to which the property is put but the way in which it was acquired, and that undoubtedly was by an act *jure imperii*.

In recent practice the nationalisation of companies is carried out without the property affected being transferred directly to the State. The company's legal personality subsists with the Government substituted for the former shareholders. Will such a commercial company, in which the State has thus become the sole shareholder, enjoy immunity of jurisdiction? This is a fairly new question, to which it is as yet difficult to give a definite answer. In the United States, the courts draw a distinction between commercial companies, of which the State is a shareholder, and branches of the Government organised as separate legal entities.[57] In England a mere declaration by the foreign State,

[54] *The Cristina* [1938] A. C. 485; *The Arantzazu Mendi* [1939] A.C. 256; Cour d'appel Bruxelles, July 7, 1937, *Journal des Tribunaux*, 1938, p. 166.

[55] *The Abodi Mendi* [1939] P. 178; on that case see: Cheshire, *op. cit.*, p. 182; and 21 *British Year Book Int. Law* (1944), p. 181.

[56] M. Wolff, *op. cit.*, pp. 55–57; and Oppenheim–Lauterpacht, *op. cit.*, p. 239–240, where further references will be found.

[57] Oppenheim–Lauterpacht, *op. cit.*, p. 240.

through diplomatic channels, that a given company is in fact a branch of the Government is sufficient to ensure jurisdictional immunity.[58] In Austria it has been held that a nationalised commercial undertaking was not entitled to jurisdictional immunity.[59] If this last attitude were to prevail, would it mean that the shareholder of a nationalised company would be entitled to claim before a foreign court his part in the company's assets? The answer seems to be in the negative. The company continues in existence as a separate legal entity and the shareholders have therefore no direct title to the company's assets. The object of their claim must be the shares of which they have been deprived and so they must needs come up against the State's sovereign immunity.

When title to the property has been transferred by the State to a third party, whose title is challenged by the expropriated owner, the foreign court will have to pass judgment upon the validity of this transfer. Will public policy prevent the recognition of the transfer? There is no unity of opinion on this matter.

In England it has been held, with regard to Soviet measures of nationalisation, that title to property situated within the jurisdiction of the confiscating State has validly and conclusively passed to the State and that hence the claim brought in England against the third party must fail, even though the previous owner is a British subject.[60] The line taken by the German courts was the same.[61] A Belgian judgment was given to the same effect with regard to Mexican oil.[62] In Austria also, a decision to the same effect was given by the Supreme Restitution Commission concerning a German confiscation in Czechoslovakia.[63] The same attitude was taken by the courts of the United States with regard to the confiscatory measures of the German National-Socialist Government.[64]

On the other hand, in France, the *Cour de Cassation* has decided in favour of a company expropriated during the Spanish Civil War in an action brought against the third party who had bought the

[58] *Krajina* v. *The Tass Agency* [1949] 2 All E.R. 274; 44 *American Journal Int. Law* (1950), p. 204.

[59] Handelsgericht Wien, June 21, 1948, quoted in Dr. Seidl-Hohenveldern's Report.

[60] *Luther* v. *Sagor* [1921] 3 K.B. 532; *Princess Paley Olga* v. *Weisz* [1929] 1 K.B. 718.

[61] Landgericht Berlin, December 11, 1928 (*Scherbatov* v. *Lepkes Kunstauktionshaus*), *Zeitschrift für Ostrecht*, 1929, p. 1366.

[62] Tribunal civil Anvers, February 21, 1939, *Belgique Judiciaire*, 1939, p. 371, with critical note by Wigny.

[63] Austrian Supreme Restitution Commission, October 30, 1949, quoted in Dr. Seidl-Hohenveldern's Report.

[64] *Bernstein* v. *Van Heighens Frères S.A.*, N.Y.C.C.A. (2d.) 1949, 42 *American Journal of Int. Law* (1948), p. 217

expropriated potash from the Catalan Government.[65] In the case decided by the *Cour de Cassation* the third party's *mala fides* was evident. The question is raised by Niboyet whether the decision would have been the same with regard to a *bona fide* third party.[66]

It thus appears that on that important question the French courts and the courts of other countries hold different views. It seems difficult to predict how the courts will decide in countries where they have not as yet had to try such cases. In each country the courts must appreciate to what extent their public policy prevents the recognition of a title acquired abroad under the applicable law.

V

It may be stressed again, by way of conclusion, that the effect of confiscatory measures is strictly limited to the territory of the confiscating State. But once they have been carried into effect within the jurisdiction, the unconditional recognition of the third party's title, as applied by the English and American courts, and the doctrine of jurisdictional immunity both combine to reduce to a bare minimum the protection which foreign courts can give to dispossessed owners. Moreover, foreign courts can only step in after the confiscated property has been brought within their jurisdiction. Otherwise the dispossessed owner's only chance is diplomatic protection, which is slow, uncertain and reserved for nationals of the intervening State. It is quite obvious that progress of the law in this matter will only be achieved by the international judicial protection of the rights of man.

George A. van Hecke.[67]

[65] Cass. civ., March 14, 1939, *Sirey*, 1939-1-182.
[66] *Op. cit.*, t. IV, n° 1213; the same question is raised by Van Brakel, *op. cit.*, p. 101.
[67] Professor of Law, University of Louvain; and of the Brussels Bar.

NOTES

International Organisation

Italy and the Trusteeship Council

On December 2, 1950, the General Assembly approved the Trusteeship Agreement by which Italy was to be the administering authority of the trust territory in Somaliland. At its eighth session the Trusteeship Council revised its Rules of Procedure in order to allow Italy to participate in its proceedings without vote, when Somaliland or general questions concerning the international trusteeship system were being discussed. Further, on February 23, 1951, the Council, by nine votes to one (U.S.S.R.) with two abstentions (United Kingdom and New Zealand), requested the General Assembly to take up the question of Italy's ' full participation in the work of the Trusteeship Council '.

Italy's place in the trusteeship system is anomalous, since she is not a Member of the U. N. Article 81 of the Charter provides that the administering authority of a trust territory may be ' one or more States or the Organisation itself ', while Article 86 (1) states that ' The Trusteeship Council shall consist of the following Members of the United Nations (a) those Members administering trust territories ', and provides that the total membership of the Council is equally divided between Members which administer, and those which do not administer trust territories. Thus while a non-Member is not precluded, given the use of the word ' States ' in Article 81, from becoming an administering authority, it is excluded by the language of Article 86 from membership of the Trusteeship Council. Nevertheless there are several reasons for thinking that this is Italy's position under the Charter. First, while the word ' State ' is used in the Charter sometimes to mean non-Members and sometimes to cover both Members and non-Members, it is never used to refer to Members only (except in Article 3 where it has a special qualificatory sense) : ' States ' therefore in Article 81 must comprise Members and non-Members and the General Assembly has so interpreted it in the case of Italy; the drafters therefore, having in mind that a non-Member might be an administering authority, must have deliberately excluded it from the provisions of Article 86. Secondly, the terms of the Somaliland Trusteeship Agreement are peculiar

in that, unlike the other trusteeship agreements, it makes Italy 'responsible to the United Nations for the peace, order and good government of the Territory' and also provides in effect for the termination of Italy's trust after ten years; further, a United Nations Advisory Council is to 'assist' Italy in her administration. In other words, the United Nations has made it a condition of the partial restoration of Italian rule in Africa that Italy's position as trustee shall be temporary and strictly subordinate to the U.N. It does not appear then that Italy can base any claim of right to 'full participation', that is, a seat with a vote, in the Trusteeship Council, upon the Charter or the Somaliland Trusteeship Agreement. In any case, 'full participation' in this sense cannot be granted to her without amendment of Article 86 in accordance with the provisions of Article 108. The Soviet vote against reference of the matter to the General Assembly suggests that amendment will not be feasible.

I.L.O. Conventions

The International Labour Organisation has published an interesting chart of ratifications of labour conventions, adopted in the thirty-two sessions of the I.L.O. Conference from its establishment until 1949. While firm conclusions could be drawn only from a thorough analysis of the chart and of the character of the conventions themselves, certain features stand out and are worthy of remark. First, there has been a sharp decline in the rate of ratification: of the first thirty conventions, adopted between 1919 and 1930, there were 802 ratifications, giving an average of twenty-six ratifications (with allowance for withdrawals) for each convention. Of the next thirty-seven conventions, adopted between 1931 and 1939, there were 269 ratifications, yielding an average of seven for each convention; and of the thirty-one conventions adopted between 1946 and 1949 there have been 124 ratifications, but no withdrawals, giving an average of four. Second, countries show consistency in their policy of ratification of I.L.O. conventions; thus Bulgaria which has by far the greatest number of ratifications to its credit (sixty-two), has ratified eleven of the conventions adopted since 1946; and France and the United Kingdom, who follow with fifty-two and forty-nine ratifications, have ratified respectively ten and thirteen of the recent conventions. No other country has ratified more than thirty-five, except Belgium (thirty-eight). So at the other end of the scale twelve countries, including the Soviet Union and Iran, have ratified none, though some of these countries such as Indonesia, Israel, Philippines, and Vietnam, have had but a short time to do so. The United States has ratified five of the 1936 conventions and the Final Articles revision of 1946.

Export of War Materials to China

On May 18, 1951, the General Assembly of the United Nations adopted a resolution [1] recommending a selective embargo on the export of raw materials to China. This resolution raises two important questions: Was it within the competence of the General Assembly? Is it to be regarded as a step taken under Chapter VII of the Charter?

The effect of the last sentence of Article 11 (2) upon the competence of the Assembly in this field was discussed in the last number of this *Quarterly* in relation to the 'United Action for Peace' resolution, and it was thought that the Assembly was not competent to take action of this kind. The fact that an Assembly recommendation is not technically binding as such seems immaterial in a case where disregard for the recommendation probably means a breach by Members of more general Charter obligations: it would in any case be politically difficult if not impossible for the majority of Members to continue exporting war material to China after the adoption of the resolution. Further, the resolution may well be binding at least on those Members which voted for it.

But if it is assumed that the Assembly, even if not strictly competent under the terms of the Charter, is at least justified in adopting the resolution, is it a step under Chapter VII? If the General Assembly acts, *pro vice* the Security Council, as it now appears to be doing, do the Charter provisions laying down the powers and duties of the Security Council govern its action? The present resolution is, in general scope, covered by Article 41; but is it 'measures' taken under that Article or simply an act of the Assembly under Article 10? These are serious questions: for there is a little doubt that once there is a determination of aggression under Article 39, the Charter requires the Security Council to advance step by step through Articles 40 and 41 to Article 42; it is a slippery slope. If then the resolution is to be regarded as action under Article 41, it may be later argued that there is *legal* justification for a further advance by the Assembly into Article 42.

International Court of Justice

On May 28, 1951, the court gave its opinion upon the effects of reservations to multilateral conventions.[2] By a majority of seven to five it held:—

[1] U.N. Documents A/1799: A/C.1/SR443, 444.

[2] The questions put to the court will be found in this Quarterly (April, 1951), at p. 228. The application by the United Kingdom in the matter of the Anglo-Iranian Oil Company is summarised in the Documents section below. Further references to the court will be found in the List of Documents.

On Question I:

a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, the State cannot be regarded as being a party to the Convention.

On Question II:

(a) if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

(b) if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention;

On Question III:

(a) an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

(b) an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.

Two dissenting opinions were appended to the Opinion: one by Vice-President Guerrero and Judges Sir Arnold McNair, Read and Hsu Mo, the other by Judge Alvarez.

PUBLIC AND PRIVATE INTERNATIONAL LAW

STATUTES AND STATUTORY INSTRUMENTS

The *Foreign Compensation Act*, 1950,[1] is of interest to public international lawyers and to constitutional lawyers because it creates new machinery for use when the royal prerogative is exercised in the field of foreign affairs. It is of interest to private international lawyers and comparative lawyers because of the occasion it provides for resort to and proof of foreign law. The immediate object of the Act is to provide machinery—in the form of a statutory commission acting as a quasi-judicial body—for

[1] 14 Geo. 6, c. 12.

the distribution of moneys received by the Crown under agreements made with Yugoslavia in 1948 [2] and 1949 [3] and with Czechoslovakia in 1949.[4] These agreements provide for the payment of compensation by each of those two States in respect of British property, rights and interests affected by various measures of confiscation, expropriation or nationalisation. When similar claims have arisen in the past they have been the subject either of proceedings before Mixed Claims Commissions, or of individual negotiations and agreements in respect of each claim or, as in this case, of collective negotiation and complete settlement of all claims by payment of a global sum. For the property seised in Czechoslovakia the sum to be paid is £8 million and for that in Yugoslavia £4½ million. Such moneys are not received by the Crown as an agent or trustee for the former owners of the expropriated property [5] and, consequently, the decision to distribute and the methods of distribution of these sums is a matter entirely within the discretion of the Crown. This principle underlies the Act, though it is to some extent modified by it. There is still no obligation upon the Crown to make up these funds available for distribution and, if it does not, no action can lie against it. On the other hand, because of the complexity of the claims involved—for the total sums claimed will vastly exceed the amount available for distribution—the Crown is now provided with a body to which it can entrust the payment of these moneys. Once these compensatory sums have been so entrusted they must be distributed on principles clearly laid down by Order in Council. It is this last point which represents the modification of existing practice. Nonetheless, it appears from section 4 (4) of the Act, which provides that ' the determination by the Commission of any application made to them under this Act shall not be called in question in any court of law ', that, apart from review at the discretion of the Commission under Rule 37 of its Rules, there is no appeal from a decision of the Commission which departs from principles laid down by the Order in Council.

The Act is primarily a ' parent Act '; that is to say, beyond authorising the establishment of a Foreign Compensation Commission (section 1), granting it certain powers to enforce the attendance of witnesses, the production of documents and the furnishing of information (section 5) and obliging it to prepare accounts and an annual report (section 6), it is concerned with authorising the subsequent preparation of detailed rules. The Act also provides that the

[2] Treaty Series, No. 2 (1949), Cmd. 7600.
[3] Treaty Series, No. 5 (1950), Cmd. 7875.
[4] Treaty Series, No. 60 (1949), Cmd. 7797.
[5] See *Civilian War Claimants Association, Limited* v. *The King* [1932] A.C. 14.

Commission is to register claims for the purpose of assisting in the conclusion of further agreements. Accordingly, there have now been made three Orders in Council, referred to as the Czechoslovak Order,[6] the Yugoslav Order [7] and the Administrative and Financial Provisions Order.[8] In addition, the rules of procedure of the Commission, prepared by the Commission and approved by the Lord Chancellor, are contained in the Schedule to the Foreign Compensation Commission Rules, Approval Instrument, 1950.[9]

The Yugoslav and Czechoslovak Orders contain the substantive rules to be applied by the Commission in determining claims. The object of each claim is to establish a right to participate in the Yugoslav or Czechoslovak funds, as the case may be, which are the funds received by the Crown under the Agreements and paid by it to the Commission for distribution. A successful claimant to a share in either of those funds will receive in respect of each claim which he establishes a fraction of the particular fund equal to the proportion which the assessed amount of his claim bears to the total of the amounts assessed with respect to all claims to that fund which are successfully established. Consequently, the percentage which a successful claimant will recover of his original property holdings is unlikely, in the case of Yugoslav property, to be more than 45 per cent. and, in the case of Czechoslovak property, it will be much less, perhaps 25 per cent.

In order to establish a claim under the Orders the claimant must show that he is a person qualified to make such an application, that the property or interest in property to which his claim relates was British at the relevant date, that he has been deprived of title to or enjoyment of that property and that he has suffered loss as a result of such deprivation. A greater number of persons are qualified to apply under the Yugoslav Order because the agreement with Yugoslavia was concluded by the United Kingdom on behalf also of the Governments of Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon, whereas the agreement with Czechoslovakia was concluded only on behalf of the United Kingdom and its dependent territories. A further difference between the Yugoslav and Czechoslovak Orders is that in addition to the compensation which may be recovered for property of any kind, movable or immovable, under both Orders, the Yugoslav Order makes provision

[6] The Foreign Compensation (Czechoslovakia) Order in Council, 1950 (SI 1950. No. 1191).
[7] The Foreign Compensation (Yugoslavia) Order in Council, 1950 (SI 1950. No. 1192).
[8] The Foreign Compensation (Administrative and Financial Provisions) Order in Council, 1950 (SI 1950, No. 1193).
[9] SI 1950, No. 2042.

for the recovery of any trade or commercial debt or any other debt arising out of contract, incurred by the owner of any British property who was deprived of title to or enjoyment of that property, if the debt was incurred in the course of the conduct of the enterprise or business in which such property was used. The ' relevant date ' for both Orders is, generally speaking, at the option of the person making the application, the date on which the law or decree affecting the property entered into effect or the date on which the property to which the claim relates was placed under State administration. Thus, no claim can be preferred in respect of property or interests in property which after the revelant date were transferred to British subjects either by way of assignment inter vivos or on death or on bankruptcy. Once a claim has been established the Commission is to assess the loss at such amount as seems just and equitable to the Commission having regard to all the circumstances.

The Financial and Administrative Order [10] contains no provisions of general interest. The Commission Rules,[11] however, require some examination. They provide (inter alia) that applications under the Czechoslovak and Yugoslav Orders must be made by March 31, 1951, in the case of applicants residing in the United Kingdom, or April 30, 1951, in the case of applicants residing elsewhere. This time can be extended and, it is assumed, in cases of proven hardship, will be extended with the leave of not less than three members of the Commission.

Since the establishment of each claim will to a large extent depend upon proof of the existence of the right claimed in Czech or Yugoslav law, the problem of proof of foreign law is one which will constantly be before the Commission. In English courts foreign law is presumed to be the same as English law unless evidence to the contrary is introduced. This evidence, like any other, may be disproved by the evidence of an expert witness who is prepared to give a contrary opinion. Moreover, the decision in any one case which depends on questions of foreign law is not a binding precedent as regards the determination of that question of foreign law should it arise in any later case. The difficulties inherent in this situation have been anticipated in the drafting of the Commission Rules. Accordingly, Rule 4 provides that the Commission shall not be bound by rules of evidence and may admit in evidence any document or any statement whether on oath or not which it deems to have probative value. Moreover, Rule 23 provides, first, that each side may not, unless with leave,

[10] SI 1950, No. 1193.
[11] SI 1950, No. 2042.

call more than one expert witness in respect of each technical aspect of the application and, secondly, that the Commission may order that a report be provided by any person nominated by them on any matter which they are to consider. Lastly, Article 21 provides that issues of general importance affecting a substantial number or class of applications may be heard and determined in respect of all such applications and that the determination of any such question shall be binding in any future proceeding. These rules, it is believed, will considerably mitigate the difficulties connected with recourse to foreign law.

E. LAUTERPACHT.

The *Maintenance Orders Act, 1950*, which came into force on January 1, 1951, enables certain maintenance orders and other orders relating to married persons and children, to be made and enforced in England (and Wales), Scotland and Northern Ireland.

Part I (ss. 1–15) of the Act makes provision as to the jurisdiction of the English courts in the following matters : making of summary maintenance orders; making by courts of summary jurisdiction of orders for custody and maintenance of infants; making of affiliation orders; contributions under the Children and Young Persons Act, 1933 and the National Assistance Act, 1948, and transfer of proceedings. It also makes provision as to the jurisdiction of Scottish and Northern Ireland courts in corresponding matters.

Part II (ss. 16–25) of the Act provides for the registration and enforcement of maintenance orders made in one part of the United Kingdom, in the other parts of the United Kingdom.

The remainder of this Part is concerned with the definition of maintenance orders so enforceable, procedure for registration and enforcement, and connected matters. The scheme for registration and enforcement is generally similar to the provisions for the enforcement of absolute orders under the Maintenance Orders (Facilities for Enforcement) Act, 1920. There is, however, divergence in at least one important respect. Under the earlier Act enforcement is virtually automatic once an order is registered, but under the new Act it is necessary for the party who seeks enforcement to take the appropriate steps in accordance with the law of the country of registration.

Part III (ss. 26–32) of the Act deals with proof of declarations, general provisions as to jurisdiction, interpretation and miscellaneous matters.

This Act has several noteworthy effects in private international law.

1. In 1949 in *Macrae* v. *Macrae*,[1] a wife, on a summons against her husband under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1925, claimed a maintenance order on the ground of desertion. The wife was ordinarily resident in England, and had there been deserted by her husband, who had, after the desertion, become ordinarily resident in Scotland. The summons was served on the husband by virtue of section 4 of the Summary Jurisdiction (Process) Act, 1881. The Court of Appeal held (following its decision of the previous year in *Forsyth* v. *Forsyth*[2]) that English justices had no jurisdiction on the summons owing to the fact that the husband was resident in Scotland. Section 1 (1) of the new Act provides:

> 'Subject to the following provisions of this section, a court in England shall have jurisdiction in proceedings under section four of the Summary Jurisdiction (Married Women) Act, 1895, against a man residing in Scotland or Northern Ireland, if the applicant in the proceedings resides in England and the parties last ordinarily resided together as man and wife in England.'

The purpose of this subsection clearly is to cover situations like that which arose in *Macrae* v. *Macrae*. That decision is no longer law. What is interesting, however, is that the authority of *Forsyth* v. *Forsyth*, which was followed in *Macrae* v. *Macrae*, is probably unaffected. In *Forsyth* v. *Forsyth* the facts were generally similar to those in the later case except that there was no suggestion that the husband had ever resided in England. The desertion took the form of a refusal by the husband who was ordinarily resident in Scotland and who had lived there with his wife, to follow his wife to England, after she had moved there on the understanding that he would do so. Owing to the curious requirement of the subsection that the parties must have 'last ordinarily resided together as man and wife in England', English justices would still have no jurisdiction to entertain a complaint such as that of Mrs. Forsyth.

2. The problem of the proper construction of the Summary Jurisdiction (Process) Act, 1881, s. 4, came before the House of Lords in *Berkley* v. *Thompson*[3] in 1884. Lord Selborne L.C. construed the section narrowly and laid down the general principle that its effect was procedural only, and that it did not in itself extend jurisdiction. This wide principle was followed in *Forsyth* v. *Forsyth* and *Macrae* v. *Macrae*. The actual decision in *Berkley* v.

[1] [1949] P. 397.
[2] [1948] P. 125.
[3] (1884) 10 App.Cas. 45.

Thompson, a bastardy case, turned largely on section 6 of the 1881 Act, which deals with bastardy proceedings. The House of Lords held that the 1881 Act did not enable a bastardy summons to be issued by English justices and served in Scotland upon a putative father domiciled and resident in Scotland. This rule is reversed by section 3 (1)[4] of the new Act 'if the act of intercourse resulting in the birth of the child or any act of intercourse between the parties which may have resulted therein took place in England'. Whether this proviso would have excluded the actual facts in *Berkley* v. *Thompson* from the operation of the Act, is not clear from the report of the case. What is more important, and equally unclear, is the rationale of the limitation. Quite apart from the obvious difficulties of proof to which it can give rise, the requirement, attributing as it does unnecessary importance to the locus actus, runs counter to the current private international trend away from a mechanical territorial approach.

3. In 1950 in *R.* v. *Sandbach Justices*,[5] a Divisional Court held that proceedings under the Guardianship of Infants Acts, 1886–1925, other than those taken in the High Court, must be brought in the area in which the respondent lives. In the instant case, the mother lived in Cheshire, the father in Oxfordshire and the child in Northern Ireland. The court held that Cheshire justices had no jurisdiction to hear an application by the mother owing to the fact that the father was resident in Oxfordshire. It further intimated that although the fact that the child was outside the jurisdiction of the Cheshire magistrates was not in itself an absolute bar to their making an order, it would be exceptional and in many cases undesirable for them to do so. Section 2 (1) of the new Act provides:

> 'An order under the Guardianship of Infants Acts, 1886, and 1925, giving the custody of an infant to the mother, whether with or without an order requiring the father to make payments to the mother towards the infant's maintenance, may be made, if the father resides in Scotland or Northern Ireland and the mother and the infant in England, by a court of summary jurisdiction having jurisdiction in the place in which the mother resides.'

Had (i) the father been resident in Scotland or Northern Ireland, and (ii) the child been resident in England in *R.* v. *Sandbach Justices*, this subsection would have had the effect of reversing that decision. It is perhaps a little difficult to understand why the legislature has relieved the applicant of the necessity of going to the

[4] Read in conjunction with section 27 (2).
[5] [1951] 1 K.B. 62.

court in the area in which the respondent lives, only if he lives in a different part of the United Kingdom, but not if he resides in a different area in the same part. An applicant resident in Carlisle need not go to the respondent's court if he resides in Dumfries, but must do so if he resides in Penzance.

Section 27 (1) provides :

> ' Nothing in this Act shall be construed as derogating from any jurisdiction exercisable, apart from the provisions of this Act, by any court in any part of the United Kingdom.'

The combined effect of the dicta in *R.* v. *Sandbach Justices*, the proviso in section 2 (1) to the effect that the infant must be resident in England, and this subsection, appears to be that if a court has jurisdiction by virtue of the Act, the place of residence of the infant is crucial, but that if an English court has jurisdiction dehors this Act, the place of residence of the infant is, although relevant, not crucial.

The condition precedent in section 1 (1) that the parties must last ordinarily have resided together as man and wife in England, the condition precedent in section 2 (1) that the infant must reside in England, and the condition precedent in section 3 (1) that the productive or a possibly productive act of intercourse must have taken place in England, all appear to have one feature (apart from apparent lack of policy justification for their existence) in common with each other. They are all instances of a requirement that what may be described as ' the cause of action ' (using the term untechnically) should have arisen in England. This point was taken by the Lord Advocate in the Standing Committee in a speech [6] in which he pointed out that this general limitation which is deliberately made throughout the Act represents a concession to the well-established principle of Scottish law that jurisdiction is vested in the court of the defender's residence. Having drawn attention to the divergence between this Scottish rule and the English rule (which he castigates as ' rather unique in international law ' [7]) according to which jurisdiction is given to the court of the plaintiff, the Lord Advocate emphasised the desirability of compromise and ' marrying of legal principles ' : this he said would be achieved by a rule (subsequently accepted and now embodied in the Act) which allowed jurisdiction to the plaintiff's court provided, but provided only, the ' cause of action ' was in the country in which that court is situated. He is emphatic that in agreeing to even this compromise

[6] Parliamentary Debates (House of Commons). Standing Committee A. Official Report. Maintenance Orders Bill (Lords). First Sitting, June 27, 1950, col. 20 *et seq.*

[7] At col. 21.

'Scottish law is taking a very big step forward, because it is recognising for the first time the court of the plaintiff or the pursuer as distinct from the court of the defendant or defender, and it is only objecting to the condition that the act or acts must have taken place in that area because there is a quasi-criminal history in both affiliation and adultery cases'.[8] His use of the word 'forward', in so far that it connotes progress, is presumably '*per incuriam*', as later the learned Lord Advocate observed 'If it were a question of doing one or the other [*i.e.*, rejecting compromise and accepting *in toto* either the English or the Scottish rule] I would say, as a lawyer, that adoption of the Scottish system was more justified'.[9] That the Lord Advocate saw fit to put such great reliance on the quasi-criminal history of both affiliation and adultery cases in order to justify the provisions of an Act the purpose of which is the relief of contemporary injustice is perhaps indicative of a dearth of more persuasive arguments based on policy considerations. Moreover, with all respect, it cannot be overlooked that the general tenor of the Lord Advocate's argument gives the impression that he regarded the marrying of legal principles as in some way desirable for its own sake. In fact he said expressly 'I agree that this is a question of balance and we have to recognise that it is not only a matter of convenience but of legal principles'.[10] It may be that this regard for legal principle as such, will not commend itself to those who regard the task of the legislature in Acts such as the instant one to be the satisfaction of social and human needs rather than the striking, by the exercise of legal ingenuity, of a perfect balance between conflicting legal principles. As Mr. Boyd Carpenter said in the course of a speech in the same committee 'After all, while legal principle is a very valuable and important thing—and I should be certainly the last person to dispute its value—it only exists to serve human needs, and if the result—as I believe is the result in this case—of seeking, with great ingenuity, to reconcile the legal principles of the two kingdoms by producing a solution which is consistent with neither is to produce a situation which, on balance, produces more hardship than an alternative solution, then, with respect to legal principle, legal principle must go'.[11]

Viewed simply from the standpoint of policy considerations, the clash of interests is between those of the man and those of the woman. Either will be inconvenienced by having to go to the court of the other. But it is submitted that there are several special

[8] At col. 25.
[9] At cols. 27–8.
[10] At cols. 27–8.
[11] At col. 28.

reasons that should weigh the balance in favour of the woman. (1) In cases under section 2 and section 3 she is handicapped : *ex hypothesi* she has an infant to look after. (2) The man, like all defendants, is possibly a wrongdoer in the sense that he may be held liable. The woman, like all plaintiffs, is, on the instant issue, generally not. (3) Appropriate legal advice, especially free legal advice, will be difficult to obtain except in the country of the venue. Possible plaintiffs require advice more often than defendants. One of the latter is not liable to require advice until a plaintiff has taken advice *and* decided to litigate.

4. It should perhaps be noted that sections 1 (2), 2 (2) and 3 (2) provide that a court in England shall have jurisdiction in the majority of converse cases to those dealt with in sections 1 (1), 2 (1) and 3 (1), *i.e.*, in cases in which the applicant is resident in Scotland or Northern Ireland and the person against whom the application is made is resident in England.

5. In the course of his judgment in *Macrae* v. *Macrae*, Somervell L.J. referred to the possibility that the decision in *Forsyth* v. *Forsyth* may to some extent have turned on the husband's Scottish domicile. Any doubts which may have been raised by the learned Lord Justice as to the irrelevance of the domicile of either party in such proceedings, have, together with any doubts which may have existed as to the irrelevance of the infant's place of birth in affiliation proceedings, been laid to rest by section 27 (2) of the new Act. Section 27 (2) provides :

> ' It is hereby declared that any jurisdiction conferred by Part I of this Act, or any enactment therein referred to, upon a court in any part of the United Kingdom is exercisable notwithstanding that any party to the proceedings is not domiciled in that part of the United Kingdom; and any jurisdiction so conferred in affiliation proceedings shall be exercisable notwithstanding that the child to whom the proceedings relate was not born in that part of the United Kingdom.'

The wording of this subsection is interestingly wide. The effect of the insertion of the words ' . . . or any enactment therein referred to . . . ', and the absence of any limitation of domicile for the purposes of the subsection to English, Scottish and Northern Irish domicile, or of the scope of the subsection to births within the United Kingdom, is both noteworthy and, it is submitted, to be welcomed. The intention of the legislature would appear to be to render immaterial the domicile of the parties and (in appropriate cases) the place of the infant's birth not only in cases where the party in question is domiciled, or the child is born, in another part of the United Kingdom, but also in cases where the party is domiciled in,

or the child is born in, a politically foreign country. This means that decisions such as those in *R.* v. *Blane* [12] and *O'Dea* v. *Tetau* [13] no longer represent the law. In *O'Dea* v. *Tetau*, a German woman resident and domiciled in Germany gave birth to a bastard child in Germany. A Divisional Court, following *R.* v. *Blane* and distinguishing (and to some extent doubting) *R.* v. *Humphrys*,[14] held that English justices had no jurisdiction to grant an affiliation order against the putative father, an Englishman in this country.

In *R.* v. *Humphrys* a Divisional Court held by a majority that the fact that a bastard, the child of English parents resident and domiciled in England, was born abroad, was not a bar to bastardy proceedings. The majority distinguished the earlier case of *R.* v. *Blane* on the grounds that there the mother was a French domiciliary. In point of fact it is by no means clear from the report of *R.* v. *Blane* that this was so. In fact the headnote runs directly counter to this view of the facts taken by the majority in *R.* v. *Humphrys*: 'A bastardy order cannot be made on the putative father under Statute 7 & 8 Vict. c. 101, s. 2, in respect of a child born abroad, although the mother became pregnant while domiciled and resident in England and returned to England with the child shortly after its birth'. But even if we accept as a fact that the mother in *R.* v. *Blane* was domiciled abroad, the reasoning in and rationale of the case is obscure. The consideration uppermost in the minds of the judges seems to have been that the bastardy laws must be regarded as part of the Poor Law, 'The burden cast upon parishes by the birth of bastard children was the foundation of that system; and the object [of the bastardy laws] was to relieve parishes from that burden. The legislature in all these statutes is obviously dealing with bastards born in some parish'.[15] If this is the rationale of *R.* v. *Blane*, the reconciliation of *R.* v. *Humphrys* with it (even if possible on the facts) is meaningless. In *R.* v. *Humphrys* the English justices were held to have jurisdiction although the child was born abroad. Coleridge J., however, in *R.* v. *Blane* goes on to make a further point: 'If the word "bastard" is, on the other hand, to comprehend any bastard born in any part of the world, an immense field of inquiry must be traversed respecting the status of children according to the different laws of different countries'.[16]

This second line of reasoning is open to the general objection that

[12] (1849) 13 Q.B. 769.
[13] [1951] 1 K.B. 184.
[14] [1914] 3 K.B. 1237.
[15] At p. 773.
[16] At p. 773.

one is not justified in rejecting a rule of law simply because its acceptance might involve investigation and application of a foreign law. Such a thesis would be tantamount to the abolition of all choice of law rules in private international law. It may be noted that English summary courts are already obliged to consider questions of foreign law, for example, the validity of a foreign marriage in wife maintenance proceedings.

Coleridge's words are also open to the more particular objection that he is mistaken in assuming that the rule which he is considering would itself give rise to a need for investigation and application of foreign law.[17] The law of the place of birth does not govern legitimacy. Even if the child is born in England, his or her legitimacy may be governed by a foreign law. Conversely, if the child is born abroad, his or her legitimacy may be determined by English law.[18]

There appears to be little contemporary justification for taking notice of the place of birth in affiliation proceedings. In so far as this is the ratio in *R.* v. *Blane* the case is incompatible with the majority decision in *R.* v. *Humphrys*. The rationale of this ground relied on by Coleridge J. was of doubtful validity even in 1849, as it was already established that it was the parish of the mother's settlement, and this even if the child was born abroad, which had to bear the burden. It has completely disappeared with the severance of the bastardy law from the Poor Law and the parish. There may well be positive policy reasons for ignoring the place of birth. It may, for instance, be purely fortuitous : or, as Donovan J. pointed out in *O'Dea* v. *Tetau*,[19] the mother may have gone abroad merely to hide her shame and intending immediately to return.

Reference to the domicile of either of the parties is also difficult to justify. The legislature has seen fit to gear the rules as to jurisdiction in the first place to 'ordinary residence'. When regard is had to the artificiality of the English concept of domicile it cannot be a matter for surprise that this other standard has been chosen. Reference to domicile as an additional requirement would in every case be either inappropriate or otiose.

[17] The majority in *R.* v. *Humphrys* rely to some extent on the fact that the mother in that case (unlike the mother in *R.* v. *Blane*) was an English domiciliary and there reference to foreign law would not (again unlike in *R.* v. *Blane*) be involved. This reliance may or may not (depending on one's view of the authoritative cases on legitimacy) merit the particular criticism, but it is still open to the general criticism.

[18] The particular objection makes sole reliance on the general objection misleading in so far as such reliance involves a line of argument which is based on an incorrect view of the private international law of legitimacy. It is with the greatest respect that it is submitted that the Lord Chancellor's criticism in parliamentary debate (*Hansard* (Lords), Vol. 168, No. 56, col. 1149 *et seq.*) of the *O'Dea* v. *Tetau* rule is defective in this respect.

[19] At p. 189.

It is to be hoped that the courts will give to the words of section 27 (2) their full meaning, and that they will not be tempted to limit its effect to cases in which the domicile or place of birth in question is in another part of the United Kingdom. That it was the intention of the legislature that cases of politically foreign domiciles and places of birth should be within the scope of the subsection was made abundantly clear by the Lord Chancellor when explaining the subsection (then an amendment rendered necessary by the decision in *O'Dea* v. *Tetau*) in the House of Lords debate. Having referred to the rule in *R.* v. *Blane* followed in *O'Dea* v. *Tetau* he said, 'The effect of the Amendment is to reverse that rule'.[20]

P. B. CARTER.[21]

Trading with the Enemy (*Custodian*) (*No.* 2) *and* (*No.* 3) *Orders, 1951*, vest in the Custodian of Enemy Property for England all trade marks registered and all patents granted in pursuance of applications made before September 3, 1939, belonging to or held or managed on behalf of any enemy, as defined in the Order. 'Any enemy' comprises the German State; individuals resident in Germany; business concerns constituted or incorporated under the laws of Germany; and concerns controlled by the foregoing. With regard to trade marks the Custodian thereby acquires the rights of a registered proprietor under Trade Marks Act, 1938, s. 25; and with regard to patents may apply for registration under Patents Act, 1949, s. 74, with the right to exercise the powers of the patentee.

DECISIONS

Re Mangold's Patent ((1951) 68 R.P.C. 1): Austrian Nationality —Enemy Status.

M., an Austrian national by birth and then residing in Vienna, applied in 1932 for a British Patent which was granted to him. In 1937 he came to this country, where he has since resided, but his application for naturalisation as a British subject was unsuccessful. The Patents Act, 1949, s. 24 (1) provides that the court or the Comptroller of the Patent Office may by order extend the term of a patent if the patentee as such has suffered loss or damage by reason of hostilities between His Majesty and any foreign State. M. applied for such extension. Lloyd-Jacob J. held that the circumstances were such as to justify such extension if the applicant was

[20] *Hansard* (Lords), Vol. 168, No. 56, col. 1150.
[21] Fellow of Wadham College, Oxford

not excluded by section 24 (8) which provides that no order shall be made on the application of a person who is a subject of such a foreign State as is mentioned in section 24 (1) and that no account shall be taken of any loss or damage suffered by any person in any period during which he was such a subject. The only question to be determined was, therefore, whether M. was a subject of a State between which and His Majesty hostilities were in progress during the material time. His Lordship answered this question in the affirmative for the following reasons :

(a) On March 13, 1938, Austria was annexed by Germany and its annexation was recognised by H.M. Government. The declaration of war by His Majesty on September 3, 1939, on Germany, therefore, related also to former Austrian territory; on the other hand, there had not existed a state of war between His Majesty and Austria herself, in spite of the Declaration made on September 16, 1947, that the formal state of war between His Majesty and Austria was terminated; (b) if by German municipal law the applicant became a German national by reason of the annexation (the learned judge referred in this connection to the German Order of July 3, 1938, imposing German nationality on all persons who had been Austrians on March 13, 1938), M. must be recognised as such; (c) if German municipal law declares him to be a German national the recognition of the annexation denies the existence of any right on the part of the applicant to elect either to remain an Austrian or to become Stateless; (d) the relevant German law must be that in operation prior to the outbreak of hostilities. Any decree that purported during the war to relieve German nationals of their allegiance would not be recognised by the courts of this country : *R.* v. *Home Secretary* (*Ex p. L.*) [1945] 1 K.B. 7. The learned judge concluded that the applicant has not satisfied him that he came within the provisions of the Act. But as the failure to adduce evidence might be attributable to M.'s erroneous view that he was a Stateless person the judge directed that if M. filed evidence on German law within a suitable period the case might be restored to the list for further hearing. As no such evidence was filed the summons was dismissed.

I think, though with great deference, that the decision in this case is open to objections.

1. Without regard to the question whether the annexation of Austria was recognised by H.M. Government *de jure* and not—as it seems—*de facto* only, it should not be overlooked that the applicant left Austria in 1937, *i.e.*, before the date of the annexation. As Dr. F. A. Mann remarks in (1945) 61 L.Q.R. 126, it is

a principle of international law that if persons leave a territory for good before the date of its annexation and do not submit to the sovereignty of the invader, then they cannot have thereby acquired the annexing State's nationality, but become Stateless. This principle was stressed by the United States Court of Appeals, *Ex rel. Schwarzkopf* v. *Uhl* (1943) 137 F. (2d.) 898, 903.[1] Consequently, as M. left before the annexation he does not appear to have acquired German nationality and the German nationality order did not apply to him under international law.

2. The Declaration on Austria signed in November, 1943, in Moscow on behalf of the United Kingdom, the United States of America and the Soviet Union declares that the three Governments regard the annexation of Austria by Germany on March 13, 1938, as null and void and consider themselves as in no way bound by any changes in the status of Austria after that date. The court could, however, as it seems, not take judicial cognisance of that Declaration as no complementary statement appears to have been made by H.M. Government.

On the other hand, the statement made by the Home Secretary in the House of Commons on December 16, 1943,[2] that 'any person now registered as German who could furnish to the police with whom he was registered satisfactory evidence that he possessed Austrian citizenship when Germany annexed Austria might, on application, be registered as Austrian', can hardly be entirely neglected. From that date every alien who was an Austrian national on March 13, 1938, but had under German regulations to enter this country on a German passport and was, therefore, registered as a 'German' could be re-registered as 'Austrian'. It is not easy to understand that such a person should still be considered by the court to be a German national.

3. The German Order of November 25, 1941, deprived all German Jews who had emigrated from Germany (and Austria) of their German nationality. As M. is of Jewish descent that Order applied to him from the standpoint of German, though not, for the reasons given above, from that of international law. In the decision cited by Mr. Justice Lloyd-Jacob, Viscount Caldecote L.C.J. held that enemy aliens 'could not throw off their disability by relying on a German law which, in time of war, purported to change their status as enemy aliens to that of Stateless persons'. This ruling will meet with approval, but only in view of the exigencies of war. Viscount Caldecote, however, went, as

[1] *New York Law Journal*, September 25, 1943. See also E. Borchard (1943) Amer.J. of Int.Law. 634; P.Abel, 8 Mod.L.R. 79.
[2] *Hansard*, House of Commons Debates, Vol. 395, c. 1677.

pointed out by Dr. Mann (*supra*), further than the decision required, by expressing doubts whether a change from enemy nationality to Statelessness could be recognised in any respect or for any purposes. Professor Lauterpacht argues in a very convincing manner 'that the reasons of public policy and national security which during the war prompted the refusal to recognise the German denationalisation decrees—those being the reasons given in *Ex p. L. and Another*—do not obtain in times of peace',[3] an argument which is approved by Dr. Mann in his review of Professor Lauterpacht's article.[4] In times of peace the principle should not be departed from that it is left to the discretion of each State to determine who is its national.[5] 'There is not and cannot be such an individual as a German according to English law' (Professor Lauterpacht, *supra*). It is true that the principle laid down in the present case has been adhered to—I venture to say unfortunately—in a previous case, *Lowenthal* v. *Att.-Gen.*,[6] in which case the question of the extension of a patent under the provisions of the Patents and Designs Act, 1907, as amended, was at issue. The present case, however, could have been distinguished from *Ex p. L.*, and from *Lowenthal* v. *Att.-Gen.*, first, because M. had left Austria before the date of its annexation which does not seem to have been the case with the other applicants; and secondly, because, as stated by Viscount Caldecote in *Ex p. L.*, it was 'conceded' by those applicants that they, although Austrians on March 13, 1938, were enemy aliens when war broke out, whereas in the present case M. denied acquisition of German nationality but claimed that he was either Austrian or Stateless. (In parenthesis: It might be doubted whether a person's nationality can be determined by his admission without any further investigation.) It might be regretted that the case was not taken to appeal and that a superior court, therefore, has had no opportunity of considering the rather important questions at issue in this case.

3. Finally, it is submitted that the question of the applicant's nationality ought also to have been considered from the standpoint of Austrian law, even if the opinion were upheld that he was still a German under German law or, more exactly speaking, under German law as applicable by English courts. For, if the applicant were an Austrian under Austrian law and a German under German

[3] 'The nationality of denationalised persons' in (1948) *Jewish Yearbook on International Law*, 164 *seq.*

[4] 3 I.L.Q. 69. See also the criticism of this decision in B.Y.B.I.L. (1946) 378 *seq.*

[5] *Stoeck* v. *Public Trustee* [1921] 2 Ch. 67.

[6] [1948] 1 All E.R. 295.

law, he would possess double nationality—a fact certainly not foreign to English thinking—and it seems to me rather doubtful whether in such a case subsection 8 of section 24 were applicable. Had the matter been considered from that angle, it would have been found that according to the construction of the relevant Austrian legal provisions [7] Austrian nationality remained in force during 1938 and 1945, in the same manner as the Austrian State—though hampered in its activity—did not cease to exist *de jure* during that period.

PAUL ABEL.

Novello & Co. v. *Hinrichsen Edition, Ltd. and Another* ([1951] 1 All E.R. 779): Transfer of copyright by enemy—penal and confiscatory law of a foreign country.

Action for alleged infringement of copyright. On September 1, 1937, the music publishing firm of C. F. Peters of Leipzig, owned by Henri Hinrichsen, in partnership with his son Hans, appointed the plaintiffs, an English music publishing company, as agents in the United Kingdom for sale of the firm's publications, but without assignment of the English copyright therein. Under a German 'Decree regarding the utilisation of Jewish property' passed on December 3, 1938, a trustee was appointed by the German Government of the firm of C. F. Peters and the Hinrichsens, who were Jewish, were forbidden to exercise their rights as partners of the firm. On July 22, 1939, the trustee, purporting to act under the decree, sold the business of C. F. Peters to two Germans Hermann and Petschull; on the same day the Hinrichsens were compelled to sign a so-called 'accession agreement', by which they were described as consenting to the contract of sale, to which they were not parties. The consent of two German Government departments, necessary to validate the contract of sale, was given on September 25, 1939; the greater part of the purchase price was taken in taxes and emigration expenses of the Hinrichsens, who had been compelled to emigrate. In 1942, Henri died in Belgium, his son Hans having predeceased him.

On February 19, 1940, and June 1, 1948, the plaintiffs obtained licences, under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, s. 2, in respect of the copyright of certain musical works published by the firm of C. F. Peters.

In 1949, Max Hinrichsen, another son of Henri, was granted letters of administration with the will annexed of his father's

[7] See A. Heinl, 'Das oesterreichische Staatsbuergerschaftsrecht', Vienna, 1950.

estate; Max was not at any material time an 'enemy' or 'enemy subject' within the meaning of the relevant Acts.

The plaintiffs brought an action against Hinrichsen Edition, Ltd. and Max alleging infringement of copyright in respect of the licences. Action dismissed with costs.

Wynn-Parry J. held that:—

(i) The German Decree of December 3, 1938, 'was plainly of a penal and confiscatory character', and 'it is established by the authorities . . . that the courts of this country will not give effect, so far as regards assets situate within their jurisdiction, to the law of a foreign country which is confiscatory in policy';

(ii) it was held in *Frankfurther* v. *Exner, Ltd.* [1947] Ch. 629, that this doctrine extended to the appointment of a trustee under such a penal and confiscatory decree, which ousted the owner from control of his business and that decision covered the present case, which was indeed *a fortiori*; it was no undue extension to apply the doctrine to sale of the business by the trustee, since in the present case the decree, the appointment of the trustee, and the sale by him were 'indissolubly linked';

(iii) the contract of sale therefore 'by a rule of public policy' did not, and could not, effect any transfer of the English copyright out of the ownership of the Hinrichsens; and no question of its affirmation or ratification by the so-called 'accession agreement' could arise;

(iv) alternatively, the contract of sale did not become effective until September 25, 1939, and, notwithstanding the retroactive effect of the consent to the sale given by the German authorities on that day, it was within the mischief of Trading with the Enemy Act, 1939, s. 4 (1), which provides that 'no assignment of a chose in action made by or on behalf of an enemy shall, except with the sanction of the Treasury, be effective so as to confer on any person any rights or remedies in respect of the chose in action';

(v) since all beneficiaries under the will of Henri were free from enemy character before June, 1948, the Comptroller had no jurisdiction to grant the licence of June 1, 1948, under section 2 (1) of the Act; while the licence granted on February 19, 1940, was non-exclusive and the second defendant Max, who was

properly to be regarded as owner of the English copyright of the musical works in question, could permit the exercise of the copyright by the defendant company, provided the statutory licence of the plaintiff was not prejudiced.

It is submitted that the English courts apply to foreign confiscatory decrees what is in fact a rule of public international law, to the effect that no State can assert any right to transfer property,[1] situated outside its territorial jurisdiction, by acts of public authority such as penal or revenue laws; and they regard measures of confiscation as analogous to penal laws,[2] not because these measures 'penalise' the property owner, but because they are also acts of public authority, subject to the same territorial limitation. It makes no difference then whether the foreign measures of confiscation are economic, being aimed primarily at property in the carrying out of national economic policy,[3] or punitive,[4] being aimed primarily at persons upon a penal, racial, or discriminatory basis; but it may be that, where there is a purported sale of property under a foreign decree of punitive confiscation, it will be ineffective in England on the further ground that it is contrary to English public policy by the rule in *Kaufman* v. *Gerson*.

The Olev and other Estonian Vessels ([1951] 84 Ll.Rep. 513).

Shipping Claims Tribunal.

A number of Estonian vessels had been requisitioned by the competent authority in the United Kingdom on various dates between October, 1940, and December, 1947. Each vessel was owned by a 'shipping association' duly constituted before June, 1940, under Estonian law, but there had been a purported transfer of some of the vessels to a Swedish registered company in December, 1941. In July, 1940, the Estonian Socialist Soviet Republic was established after occupation of the country by Russian forces; in July, 1941, Estonia was overrun by the German

1 Ships, because of their quasi-territorial character, may form an exception to this rule.

2 See Romer J. in *Frankfurther* v. *Exner, Ltd.*, at p. 636.

3 See *Re Russian Bank for Foreign Trade* [1933] Ch. 745.

4 The word 'penal' is rather ambiguous in this connection: it may mean (i) penal in the sense laid down in *Huntington* v. *Attrill*; (ii) having the effect of a penal law; or (iii) simply, punitive. Thus in *Banco de Vizcaya* v. *Don Alfonso* the Spanish sentence was 'penal' in sense (i), and cf. *Folliott* v. *Ogden*; while in *Lecouturier* v. *Rey* (discriminatory law), *Frankfurther* v. *Exner* and the present case (racial decrees), the foreign measures were 'penal' in sense (ii). In all these cases the measures of confiscation were punitive rather than economic.

army but was reoccupied by Russian forces in September, 1944. H.M. Government in the United Kingdom recognise that Estonia has *de facto* entered the U.S.S.R. and that the Republic of Estonia as constituted prior to June, 1940, has ceased *de facto* to have any effective existence.

The shipping associations or their disponents claimed compensation in respect of the requisitioned vessels under the Compensation (Defence) Act, 1939, s. 4 (1).

The Tribunal held :—

(i) ' We have had no precise evidence [5] of any actual decree or law affecting specifically any particular one of the ships. . . . On the contrary, according to the evidence of Dr. Rei, which in the absence of any evidence to the contrary we feel bound to accept, no part of the old Estonian law relating to shipping associations was ever repealed at any rate at any time material to the present claims. . . . There is no evidence [6] before us to show that the shipping associations have ever been abolished by Soviet or Soviet-sponsored legislation ';

(ii) the shipping associations must, in the absence of proof that they had been dissolved, be considered to be ' subsisting legal entities ', and to be entitled to compensation in respect of—

(a) the Olev, Kai, Mari, Juta and Vilk, through the Tallinn Shipping Co. (A/S Tallinna Laevauhisus) which was appointed disponent for the shipping associations and had succeeded in establishing its principal place of business in Sweden before the German military occupation of Estonia;

(b) the Kalev, Sulev and Torni, since the purported transfer in December, 1941, of these vessels to Aktiebolaget H. Neuhaus & Co. (a company formed in Sweden by the managing director of the Tallinn Shipping Co.) was invalid under both Swedish and Estonian law, whichever was the proper law of the transfer;

(c) the Romeo, since there was no evidence of any decree or law affecting this vessel or its shipping association and it was in any case doubtful whether any

[5] The Soviet Government took no part in the proceedings, of which it had been notified by the Foreign Office, but contented itself with replying to the Foreign Office that it claimed property in the vessels concerned, and that it did not recognise either the action of H. M. Government in requisitioning the vessels or the jurisdiction of the Tribunal to adjudicate upon the claims.

[6] However ' vague evidence ' of nationalisation measures had been submitted to the Tribunal.

such decree or law could affect the ship as it had not been in Estonian waters since 1939; vague evidence that it had sailed under the Soviet flag did not displace the claim of the shipping association;

(d) the Alar, since, although it had been seized by Russian authorities in 1940, it had been recovered and operated by Markson, *de facto* disponent for its shipping association, during the German occupation; and although it had in August, 1944, been seized by the German police and was found in Hamburg by Allied forces in 1945, renamed the Kurland, it had not been the subject of German or British prize proceedings.

Bonython and others v. *Commonwealth of Australia* ([1950] 66 T.L.R. Pt. 2, 969) : Proper law of the contract for a Government loan—meaning of ' pounds sterling '.

In 1895 the Government of Queensland made an issue of debentures in ' pounds sterling ', the principal sum to be payable ' on January 1, 1945, either in Brisbane, Sydney, Melbourne or London, at the option of the holder '. In 1927 the public debt of Queensland was taken over by the Commonwealth of Australia, which in 1932 issued consolidated inscribed 3½ per cent. stock against the surrender of the Queensland debentures, the rights of the holders, under the terms of issue in 1895, being maintained. On December 22, 1944, certain holders of the inscribed stock asked the deputy registrar of inscribed stock at Adelaide that the nominal amounts held by them be paid ' on maturity in London in sterling '. He replied on January 2, 1945, that, since the holders had failed to give the six months' notice required by the original terms of issue, they had lost the right to opt for payment in London. The holders asked the court for a declaration that they were entitled to be paid the nominal amounts of their stock, calculated in English currency, either in London in sterling or in Australian currency equivalent, and Latham C.J. stated a case for the Full Court of the High Court of Australia. The majority of the High Court (Rich, Dixon and McTiernan JJ.) were of the opinion that the Commonwealth was not bound to pay the nominal sums in English currency in London upon redemption; that, if these principal sums were payable in Australia, the holders were not entitled to be paid the equivalent in Australian currency of the amount of the principal, calculated in English currency; and that the holders were not entitled to interest upon the stock after January 1, 1945. Latham C.J. gave judgment in terms of the

majority opinion, and the holders appealed. The privy council dismissed the appeal.

Lord Simonds gave the opinion of the Board (Viscount Simon, Lords Simonds, Morton, McDermott and Reid):—

(i) it is unnecessary to decide the preliminary question of the effect of the appellants' failure to give the required notice of option for payment, since 'the question which will decide the appeal is whether, even if the claim to be paid in London was good, the appellants become entitled to be paid in due course in English currency in London the nominal amount of their stock or only the equivalent of that amount in Australian currency';

(ii) the true meaning of 'sterling' must be found by construing the debenture according to its proper law as at the date of issue;

(iii) the proper law, governing not only the meaning of the expression 'pounds sterling' but also the substance of the obligation, was the law of Queensland since

(a) lawful money in the self-governing colony of Queensland in 1895 took 'its existence and validity . . . (apart from any question arising under the Colonial Laws Validity Act, 1865) from the inherent lawmaking power of the Queensland legislature'; the legislature had exercised this power in the Treasury Notes Acts (30 Vict. No. 11 and 56 Vict. No. 37), which regulated the monetary system of Queensland;

(b) 'the substance of the obligation must be determined by the proper law of the contract, *i.e.*, the system of law by reference to which the contract was made or that with which the contract has its closest and most real connection. In the consideration of the latter question . . . it is a factor, and sometimes a decisive one, that a particular place is chosen for performance'; but, to apply this rule to the present case, the law of Queensland was the proper law since, first, 'the Government of a self-Governing country using the terms appropriate to its own monetary system must be presumed to refer to that system whether or not those terms are apt to refer to another system also' and no rebuttal of that presumption had been established by the appellants; secondly, the loan had been raised under a Queensland statute and was secured on the public resources in Queensland; and thirdly, the

choice of London as a place of performance was a factor 'of little or no weight' since payment in London was only one of four alternative modes of payment.

(iv) the appellants therefore were entitled to payment only 'in whatever currency is by the law of Queensland valid tender for the discharge of the nominal amount of the debt', that is to say, payment in Australian pounds.

In this case the Board took the view, expressed by Lord Wright in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.* ([1934] A.C. 122) against the opinion of the majority in that case, that monetary systems in England and Australia are distinct, this being 'inherent in the difference of the lawmaking authority at either place'. It was thus a question not of monetary definitions but of constitutional law; and the distinction was traced in the present case less to the commercial origins of Australian currency than to the status of Queensland as a self-governing colony, which had and exercised the power to regulate its own monetary system. Explaining and distinguishing the earlier *Adelaide* and *Auckland Cases*,[1] Lord Simonds said: 'The decision (in the *Adelaide Case*) can be fairly rested on the fact that under the altered articles of the Adelaide company payment of dividends on its stock was to be made in Australia only. It was therefore easy to conclude that on the true construction of the contract the place of performance determined the substance of the obligation, *i.e.*, the currency by which the obligation was to be measured'.[2] Further, having regard to the ruling in the *Auckland Case* that the applicability of *lex loci solutionis* 'is limited to matters which can be fairly described as being the mode or method of performance', he added: 'If the Board (in the *Auckland Case*) nevertheless found it possible to hold that, as a matter of construction of the contract, the nature of the substantial obligation was determined by the place of performance, that decision can only be rested on the words of the particular contract and the surrounding circumstances'.[2] In the present case there was no question of a change in the *locus solutionis* calling for inquiry into the scope of the law of the place of payment; nor was it necessary to explore the distinction between money of account and money of payment, since both were Australian pounds. These two questions therefore remain in the obscurity where the two earlier decisions left them.

However the present decision is of further interest for its definition of the proper law of a contract as 'the system of law by

[1] [1937] A.C. 587.
[2] [1951] 2 T.L.R. 978. For a penetrating study of the earlier decisions, see F. A. Mann, *Legal Aspect of Money* (1938) pp. 43–45, 169–179.

reference to which the contract was made or that with which the contract has its closest and most real connection'. This, it is submitted, means the system of law which the parties intended should govern the contract or, in the absence of choice by them, the system with which the contract has the most substantial connection. The controversy between the 'subjectivists' and 'objectivists' over the proper law of a contract arises partly it seems from the ambiguity of the expression 'the intention of the parties', which covers two quite separate questions: What law did the parties intend to cover the contractual obligation? What did the parties intend to be the effects and course of their contractual relationship? If the parties expressly choose a system of law, then, subject to the qualifications suggested in the *Vita Food Products Case*, that will be the proper law. But if there is no express choice, then the proper law must be determined objectively, the answers to the second question being relevant factors. It is fallacious to treat the conclusion, by this objective test, as to what is the proper law, as though it were really an answer to the first question, in other words to treat the proper law so found as the law *impliedly* chosen by the parties: the 'implied choice of law by the parties' is simply a fiction masking the objective determination of the proper law.[3] In short, the intention of the parties as the governing law should only enter in where they express a choice; but their intention as to the effects and course of the contract enters in as one of several guides for determining the proper law, where none has been expressly chosen.

McKee v. *McKee* ([1951] 1 All E.R. 942): Custody of infant—duty of court in face of foreign order.

The parties were both United States citizens and were married in Vermont in 1933. Their son was born in California on July 14, 1940. The parties separated in December, 1940, and on September 4, 1941, executed a property settlement agreement which did not specifically refer to the custody of their child but provided that neither party would remove him from or out of the United States without the written permission of the other. In the same month the mother commenced an action for divorce in Los Angeles county; the father entered a cross-complaint for divorce, and was granted a divorce and custody of the infant child of the marriage. In subsequent proceedings in the same court in California the order was varied to give full custody of the infant to

[3] See, for example, *Kahler* v. *Midland Bank, Ltd.* [1950] A.C. 24, and particularly judgments of Lord Normand and Lord MacDermott.

the mother with reasonable visitation by the father; an order to this effect was made on August 1, 1945. The father appealed to the District Court of Appeals but his appeal was dismissed; his application for rehearing and for leave to appeal to the Supreme Court of California were also denied. The consequence of his appeals under Californian law was that the order of August 1, 1945, did not become effective until January 13, 1947; meanwhile the father removed the infant from Port Austin, Michigan, where both were residing, to Ontario on December 24, 1946. The mother having at last traced their whereabouts instituted habeas corpus proceedings in the Supreme Court of Ontario and by order dated October 18, 1947, Wells J. gave sole custody of the infant to the father. The mother appealed to the Court of Appeal for Ontario which by a majority affirmed the order : on further appeal by the mother to the Supreme Court of Canada, the order was reversed by a four to three majority and sole custody given to the mother. The father appealed to the Privy Council which allowed his appeal.

Lord Simonds, giving the opinion of the Board (Lord Merriman, Lord Simonds, Lord Morton of Henryton, Lord Radcliffe and Lord Tucker) :—

(i) ' It was not and could not be alleged . . . that the courts of Ontario had not jurisdiction to decide this issue. The infant was resident, if not domiciled, in the province. He was within the King's allegiance and entitled to the protection of his courts. He was an infant, and, therefore, entitled to the special protection owed by the King as *parens patriæ* to infants ';

(ii) ' It is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody . . . to this paramount consideration all others yield. The order of a foreign court of competent jurisdiction is no exception. Such an order has not the force of a foreign judgment. Comity demands, not its enforcement, but its grave consideration. This distinction, which has long been recognised in the courts of England and Scotland (*Johnstone* v. *Beattie* (1843) 10 Cl. & Fin. 42; *Stuart* v. *Bute* (*Marquis*) (1861) 9 H.L.C. 440), and in the courts of Ontario (*Re Davis* (1894) 25 O.L.R. 579; *Re Gay* (1926) 3 D.L.R. 40), rests on the peculiar character of the jurisdiction and on the fact that an order providing for the custody of an infant cannot in its nature be final ';

(iii) ' Once it is conceded that the court of Ontario has jurisdiction . . . and that it need not blindly follow an order

made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, although in doing so it will give proper weight to the foreign judgment.'

(iv) The question of custody lies peculiarly within the discretion of the judge and his decision should not be disturbed unless he has clearly acted on wrong principle or disregarded material evidence; the considered judgment of Wells J. 'in its lucid exposition of the facts and relevant law and in its careful appraisement of the factors which in such a case must be considered' was open to no criticism.

Judgment of Court of Appeal Ontario confirming order of Wells J. restored.

In this decision the Board expressly approved the statement by Morton J. in *Re B.'s Settlement* [1940] Ch. 54 of the nature and limits of the jurisdiction of the court in questions of custody. It pointed out that in *Nugent* v. *Vetzera* (1866) L.R. 2 Eq. 704, Sir William Page-Wood V.-C. had guarded himself against any abdication of the jurisdiction of his court to appoint guardians, notwithstanding a foreign order; while in *Di Savini* v. *Lousada* (1870) 18 W.R. 425, on which counsel for the mother had also relied in the present case, the statement by Sir William James V.-C., that 'I think I am bound without exercising any judgment of my own to recognise their authority' (*sc.* of the foreign guardians), was not, if intended as a general proposition, a correct statement of the law. In that case an Italian council of guardians of an infant, appointed by the competent Italian court, had arranged for the infant to be brought up in the custody of an English couple as her deceased adoptive mother had wished. Dissatisfied with the religious upbringing of the infant, the Italian guardians asked for an order appointing two other English residents as guardians of the infant in England. The order was so made. It seems then that the order of the Italian court, appointing the Italian guardians, was not in question and that the Vice-Chancellor, in recognising their authority, was simply recognising that, as judicially appointed guardians, they were competent to arrange for the child's upbringing in England and to seek and obtain an order of the court to that end. In addition to the words already quoted he also said: 'Nothing has arisen to lead this court to say, "We ought not to recognise the authority of the Italian court"', which strongly implies that had it arisen he would have said it. It seems that here, as in *Nugent* v. *Vetzera*, there was no abdication of jurisdiction.

It appears then that the court in considering the welfare of the child as its paramount concern—

(i) ought to give due weight to a foreign order of custody; and

(ii) may, where there is no new circumstance since the making of the foreign order, exercise its jurisdiction by enforcing the order; or

(iii) may, where there are new circumstances (as in the present case) disregard the foreign order;

but that in any case it must exercise an independent judgment.

PARLIAMENT

Recognition of Foreign Governments

On March 21, 1951, the Foreign Secretary was asked on what principles he acts when deciding whether diplomatic recognition should be accorded to foreign governments. He replied:—

'The question of the recognition of a State or government should be distinguished from the question of entering into diplomatic relations with it, which is entirely discretionary. On the other hand, it is international law which defines the conditions under which a government should be recognised de jure or de facto, and it is a matter of judgment in each particular case whether a regime fulfils the conditions. The conditions under international law for the recognition of a new regime as the de facto government are that the new regime has in fact effective control over most of the State's territory and that this control seems likely to continue. The conditions for the recognition of a new regime as the de jure government of a State are that the new regime should not merely have effective control over most of the State's territory, but that it should in fact be firmly established. His Majesty's Government consider that recognition should be accorded when the conditions specified by international law are in fact fulfilled and that recognition should not be given when these conditions are not fulfilled. The recognition of a government de jure or de facto should not depend on whether the character of the regime is such as to command His Majesty's Government's approval'.

This statement is of great legal interest and, at the present time, of great importance. It sets up an international legal standard for recognition, which if generally adopted would bring some order into international relations; it contains three rules (i) the conditions which any regime must satisfy in order to be recognised as the government of a State are prescribed by international law; (ii) these

conditions are that the regime has effective control over most of the State's territory and that its control seems likely to continue; (iii) if—and only if—these conditions are satisfied, it should, as a matter of international obligation, be recognised as a government. The standard suggests the question: Is there still a subjective, political factor in recognition? The language, which must have been used advisedly and with care, suggests that in the opinion of the United Kingdom Government, there is, and indeed practice shows that there must be. The question whether a particular regime satisfies the conditions prescribed is not one of fact but 'a matter of judgment', partly because to say that the regime has effective control of national territory is a statement of fact but to say that it 'seems likely' to continue is a political prediction; so at this stage recognition de facto is appropriate, but where after a sufficient lapse of time it is plain that the regime is 'firmly established' recognition de jure should be extended. Within this framework of law and fact there is then a small margin for political judgment. Here lies the difference between the attitude of the United Kingdom and the United States to recognition. The United States regards the margin as a wide one into which moral factors may enter.

Albanian Gold

The question of the execution of the judgment, given by the International Court against Albania for £843,000 in the *Corfu Channel Case*, was raised on the adjournment on March 1. Mr. Ernest Davies said that Albania has no substantial assets abroad; in particular, the only Albanian ships at large, are, with the exception of one in Yugoslav hands, small fishing vessels, and gold held by the Tripartite Gold Commission is claimed by Italy and Albania and awaits a decision upon ownership, which must be made by the International Gold Pool. An Albanian offer in January last of £40,000 in final settlement had been rejected.

The gold to which Mr. Davies referred is that seized by Germany during the war. The United States, France and the United Kingdom have agreed to submit the question of title as between Italy and Albania to arbitration, the arbitrator to be appointed by the President of the International Court. In the event that the gold is adjudged to be the property of Albania, the Tripartite Commission has agreed that the claim of the United Kingdom under the judgment against Albania shall be met out of it.

AUSTRALIAN COMMENTARY

1. *Marital Capacity*

Capacity to marry has long been a *vexata quæstio* in our conflict of laws. The attempt at a definitive solution in the second part of the 19th century led to the notorious clash between the domiciliary camp and the advocates of the *lex loci celebrationis*. This controversy seemingly ended in favour of the domicile school, though in retrospect we may be permitted to doubt whether its triumph was as far-reaching as some authorities would make us believe. The continued presence of several, and indeed substantial, concessions to the *lex loci* theory are a constant reminder of the strong claim of considerations of public policy in the regulation and maintenance of matrimonial relations which the courts have not been unwilling to acknowledge even in the face of resulting inelegance. Thus as regards marriages contracted in England, a well-founded apprehension of unreservedly giving effect to the claim of a foreign incapacity has left us the legacy of decisions like *Sottomayor* v. *De Barros* (*No.* 2),[1] *Chetti* v. *Chetti*,[2] *Lendrum* v. *Chakravati*[3] and *Ogden* v. *Ogden*.[4] On the other hand, the principle of domiciliary control has received approbation not only for its theoretical merits as the general determining criterion of status but as the most effective bar to any attempt at evasion of law.

Though the foregoing problems have been canvassed at length in both the courts and juristic literature, little discussion has been expended and less authority seems extant on the related question whether a marriage is invalid if there exists an absolute or relational incapacity between the parties merely by virtue of the law of the country where the marriage has been contracted. Westlake, never reluctant to venture an opinion on a lacuna of the law, believed that it was indispensable for each party to have capacity both by the laws of his or her domicile *and* by the law of the place of celebration. The decisions, however, which he cited in support,[5] do not bear out the suggested conclusion, since they were concerned with formalities, not intrinsic validity of marriages. Dicey appears to have entertained considerable doubts on this matter. In his well-known book on *Domicile*,[6] he leaned towards the validity of such union on the authority of *Brook* v. *Brook*[7] and *Sottomayor* v. *De Barros*

[1] (1879) L.R. 5 P.D. 94; similarly *Pezet* v. *Pezet* (1946) 63 S.R.(N.S.W.) 238.
[2] [1909] P. 67.
[3] 1929 Sc.L.T.R. 96.
[4] [1908] P. 46.
[5] *Scrimshire* v. *Scrimshire* (1752) 2 Hagg.Con. 395; *Middleton* v. *Janverin* (1802) 2 Hagg.Con. 437; *Darymple* v. *Darymple* (1811) 2 Hagg.Con. 54.
[6] At p. 216.
[7] (1861) 9 H.L.C. 193.

No. 1),[8] while in his larger work Westlake's opinion is endorsed and accompanied by a reference to *Simonin* v. *Mallac*.[9] Again, it must be confessed that none of these cases furnishes any support either way, even to the extent of an obiter dictum. The present editors have retained his latter postulate in what is now Rule 168, Exception 2, though in caution condemning such marriages as only *probably* invalid. A more limited version of the same view appears to be entertained by Vesey-Fitzgerald, who states that, just as a foreign incapacity is in certain circumstances disregarded by English law, if the marriage has been celebrated in England, so equally a foreign capacity which is 'contrary to the policy of English law' ought to be accorded like treatment.[10] Apart from the cases of *Srinivasan*[11] and *Baindail*,[12] there is a dictum in *Warrender* v. *Warrender* to the effect that 'we would never accept a Papal dispensation as conferring on uncle and niece a capacity to intermarry in England'.[13] It is to be observed that this rule is in terms confined to marriages contracted within the territory of the adjudicating forum, is restricted to incapacity arising from undefined considerations of public policy and has so far been given effect, if at all, only in relation to polygamy, apart from Lord Brougham's dictum which deserves a cautious approach in view of the well-known shortcomings of its proponent.

The present writer has not discovered any further comment on the instant problem by other English authors except the comprehensive treatment by Professor Cheshire who squarely propounds the view that 'no system of law can allow its procedure to be used as an instrument for the contracting of unions which it renders void. . . . Every legal system requires that a marriage contracted under its protection shall conform not only to the local formalities but also to the local rules with regard to matrimonial capacity'.[14] In the third edition of his work, an important qualification has been added to the effect that in applying the *lex loci celebrationis* care must be taken to ascertain whether the local rule is not merely concerned with purely domestic marriages rather than with all marriages celebrated within its territory irrespective of the parties' foreign domicile. 'In other words, it must be realised that the court at the place of celebration would be confronted with a conflict of laws problem, and that therefore it would not necessarily apply

[8] (1877) L.R. 3 P.D. 1.
[9] (1860) 2 Sw. & Tr. 65.
[10] *Current Legal Problems* (1948), at p. 234.
[11] [1946] P. 68.
[12] [1946] P. 125.
[13] (1835) 2 Cl. & F. 488.
[14] 2nd ed., p. 222; 3rd ed., pp. 277–8.

its own domestic rule to the case'. The present writer is in full agreement with the substance of Professor Cheshire's treatment but would, with respect, venture one reservation. It should be clearly apprehended that, in giving effect to the *lex loci celebrationis*, the forum is concerned not so much with that country's conflict of law rules as these are generally understood in the sense of *general* rules designed to lead the court to the system of law appropriate to the issue of capacity, but rather with those rules, called by Dr. Robertson 'particular conflict of laws rules' which are complementary to the selected country's internal rules and delimit the sphere of their application. This distinction is one of the burdens of Cook's incisive analysis in his *Logical and Legal Bases*, and received careful attention in Robertson's monograph on Characterisation.[15] Indeed, I believe it to be sufficiently fundamental to warrant exposition in the introductory portions of the standard textbooks in order to anticipate any confusion which might otherwise arise in the reader's mind when confronted with passages such as that cited above. Thus the problem in this context is not of the *Re Annesley* type but similar to that with which the New Hampshire court was confronted in *Proctor* v. *Frost*.[16] If this were otherwise, the task so rightly stressed by Cheshire of determining whether the law in question is of territorial or personal application could not be implemented in cases where the *lex loci* and the *lex fori* coincide, since resort to the renvoi solution, whatever its form, must be stillborn whenever the *general* conflict rule of the forum leads to its own system of law. None the less, the advantages accruing from the proposed characterisation are as significant in the one case as in the other.

It can be assumed that most countries which have selected the personal law as the primary general conflict rule governing capacity to marry would be unlikely to advance a claim for a rigid territorial application of its domestic rule so as to lead to an invalidation of marriages contracted there in defiance of its internal rules by persons of a foreign domicile. Therefore, application of the Cheshire test will usually lead to the opposite conclusion on the facts of a given case from that which would result by applying the unqualified Westlake or Dicey proposition, while it would in most instances be identical with the third alternative of outright disregard of the *lex loci celebrationis*. However, for the reasons stated by Cheshire, the law of the country of celebration ought in reason to be given the opportunity of refusing to predicate legal recognition of a public

[15] Pp. 97–102, 229–234.
[16] (1938) 197 Atl. 813.

act that derives its force from the intervention of its own instrumentalities; although, be it stressed again, this ultimate power ought to be exercised most sparingly.

The suggested solution also accords in substance with the comment by the editor of Story's 8th edition who states : ' The principle that questions of status depend upon the law of the domicile seems certainly to lead to the conclusion that the intrinsic validity of marriage is governed by that law. The law of any country may of course make it unlawful to solemnise certain marriages in that country. But the natural construction of a law which creates an incapacity to marry or forbids marriages between certain races or between persons related in certain degrees, seems to be that which limits its application to persons whose status of marriage is governed by the law of that country '.[17] In other words, it will usually be found that the internal rules of the country of celebration will, upon sensible characterisation, emerge as either altogether inapplicable to the marriage of foreign domiciliaries or at most as containing *directory* impediments for this purpose without imposing *diriment* sanctions once such marriage has been contracted in defiance of its domestic rules.[18] Another and more practical advantage of neutralising the *lex loci* as much as possible is the reduction in incidence of those awkward conflicts which would arise where by that system the marriage is rendered void but only voidable according to the law of the domicile, or vice versa. This may have important repercussions on the question of jurisdiction in nullity which I have elsewhere attempted to indicate.[19]

The only judicial authority bearing on this matter which the present writer has been able to discover is the decision of the Victorian court in the *Will of Swan*.[20] The deceased had made a will prior to going through a marriage with his deceased wife's niece in Scotland. Both parties were throughout domiciled in Victoria by the law of which such marriage was, and still is, only voidable, Lord Lyndhurst's Act of 1835 never having been adopted in that State.[21] The case was argued on the footing that by the law of Scotland the marriage was totally void. The question before Molesworth J. was whether to grant a rule for revocation of probate on the ground that the alleged marriage had revoked the previously executed will. The application was supported on the basis of the

[17] Pp. 218–9.
[18] See Wolff, 1st ed., pp. 327–8.
[19] 23 Austr.L.J. 458.
[20] (1871) 2 V.R. (I.E. & M.) 47.
[21] Such marriage was voidable in England prior to 1836, void until the Marriage Act, 1931, and is now valid : Marriage Act, 1949, s. 1 (2) and Part II of First Schedule.

well-known ecclesiastical principle that after the death of one of the parties a voidable marriage ceases to be impeachable. The issue was, therefore, squarely joined on whether a marriage is invalidated by reason of relational incapacity, if not conforming to the domestic law of the country of celebration, though valid by the parties' domicile. The court decided in favour of intestacy, the gist of the judgment being contained in the following passage: 'The validity of marriages as to ceremonial and so forth depends upon the law of the place of the marriage, but as to the policy of the occurrence of such marriages and their result should depend, I think, upon the law of the country of the parties in which they are afterwards probably to live'. The decision amounts to a clear rejection of the Westlake view, and it is interesting to note that the facts of the case almost exactly correspond to the illustration problem 1, appended to Dicey's exposition, where it is said that such marriage is probably invalid. The comment may be ventured that the conclusion would in all likelihood have been the same on application of the Cheshire test, though the judgment did clearly not proceed upon the analysis recommended in this note but was based on an outright rejection of the relevance of the *lex loci celebrationis*.

2. *Currency*

The placid rivulet of currency cases is gradually broadening into a respectable stream. A new tributary is the decision in *Re Queensland National Bank, Ltd.*[22] The bank in question maintained facilities and carried on business in Australia and London. It encountered severe financial stress in the course of the trading depression of the early nineties and finally submitted to a scheme of arrangement in 1897 which was sanctioned by the Queensland, N.S.W., and English courts. Under it, the bank created and allotted interminable inscribed stock to its English and Australian creditors, registers were opened at branches in Australia and London, and the stock was upon allotment registered at the branch where the original demands were payable. There was an additional provision for transfer of stock between person and person and register and register. In 1947 the bank went into voluntary liquidation and its liquidator in the present proceedings sought guidance whether the various stockholders should be paid in English or Australian currency.

The solution adopted by Macrossan C.J. proceeded upon the line of reasoning laid down by the majority of the Australian High

[22] (1950) St.R.Qd. 264.

Court in *Goldsborough Mort & Co.* v. *Hall* [23] and *Bonython* v. *Commonwealth* [24] which was commended in a previous comment in this Journal [25] and has in the meantime received the endorsement of the Privy Council.[26] In order to determine the obligation of the bank to the stockholders it was first necessary to ascertain the proper law of the transaction since the issue is not as to the mode of performance but the *quantum* of the obligation. The monetary systems of Australia and England are no longer identical, despite the view of the majority Lords in the *Adelaide Case* [27] that up to 1932 apparently there was a common money of account. In fact, the Privy Council has in the interval virtually repudiated that decision and explained it as justifiable on the different ground that the obligation on the facts was measured in Australian pounds as a matter of construction, not because the *lex loci solutionis* determined the issue *per se*.[28]

The choice of the proper law in the present case clearly fell in favour of the law of Queensland because the bank was incorporated and in the main conducted its operations in that State, in addition to the fact that the scheme of arrangement originated and owed its validity primarily to the sanction of the Queensland court. The money of account had to be ascertained as a matter of construction. When the arrangement was concluded in 1897 it was not in the contemplation of the parties that the monetary systems would, or might, diverge. The court was, therefore, obliged to make the necessary implication from all the circumstances as to the intention which could fairly and reasonably be imputed to them.[29] This task Macrossan C.J. discharged by holding that the money of account applicable to the bank's obligations was English as regards stock *originally* issued and registered in London, and Australian in respect of stock originally issued and registered in Australia. Any subsequent changes in the place of registration were consequently immaterial. He rejected the following conceivable alternative solutions—

(a) that all principal moneys secured by the stock should be paid in Australian money of account, because this would be unjust to English creditors who received their stock in discharge of money due to them on loans which they made to the bank in England;

[23] (1949) 78 C.L.R. 1.
[24] (1948) 75 C.L.R. 589.
[25] 3 Int.L.Q. 426.
[26] *Bonython* v. *Commonwealth* (1950) 66 T.L.R. (Pt. 2) 969.
[27] [1934] A.C. 122.
[28] (1950) 66 T.L.R. (Pt. 2) at pp. 976–7, 978.
[29] Cf. *Goldsborough Mort & Co.* v. *Hall*, *per* Latham C.J. at p. 15.

(b) that all principal moneys should be paid in English money of account since this would give the Australian creditors an undeserved and unreasonable windfall, seeing that no element of their transactions had any connection with England;

(c) that the place of registration of the stock at the date of an effective winding-up resolution should determine the measure of obligation. But this would have enabled the stockholders to alter the *quantum* of the monetary obligation in their favour by changing the place of registration. The provision in the scheme for such transfers was inserted clearly for the convenience of creditors, not for the purpose of enabling them to alter the substance of the obligation. 'The principle that the mode of performance of a contract is *prima facie* governed by the law of the place of performance is limited to matters which can be fairly described as being the mode or method of performance, and is not to be extended so as to change the substantive or essential conditions of the contract'.[30] The argument here rejected bears a close resemblance to that repudiated in *Bonython's Case*[31] to the effect that provision in the contract for alternative places of payment is not necessarily indicative that the appropriate money of account is dependent on where payment is demanded.

The court also found itself unable to accede to the contention that the place of registration for the time being of the stock ought to determine the measure of obligation merely because the bank had in fact paid interest and also computed its balance sheet in Australia on that assumption. It should be noted that this element had been present in most of the preceding cases but had equally failed to gain acceptance then. Indeed, it is difficult to see how, in the absence of estoppel, the bank's conduct could prejudge the legal issue involved in these decisions.

This decision has now emerged—almost intact, albeit a little tarnished—from the crucible of an appeal to the High Court of Australia.[32] With the exception of Latham C.J., their Honours were agreed that, having regard to the history of the liabilities dealt with by the scheme of 1897, there were in effect two sets of obligations, those of stockholders on the London register belonging to the English monetary system and those on the Australian

[30] At pp. 303–4.
[31] (1950) 66 T.L.R. (Pt. 2) 969, 977.
[32] *Sub nom. Nat. Bank of Australasia* v. *Scottish Union, etc., Co.* (1951) 24 A.L.J. 533.

registers being Australian obligations and governed by the Australian financial order. Although subject to one common scheme of arrangement, there was not one single but a large number of obligations between one debtor and each of numerous creditors; and the original, quite separate, liabilities were not affected by the scheme which merely preserved the pre-existing position. This was, therefore, the ' unusual case of two classes of obligations, otherwise uniform in present character, belonging to two different monetary systems '.[33]

The court differed, however, from the trial judge in holding that, not the original place of registration, but that at the date of liquidation determined the appropriate money of account. Fullagar J., in a most lucid opinion which forms a valuable sequel to his earlier judgment on the Victorian Bench in *Goldsborough, Mort & Co.* v. *Hall*,[34] admitted that the presumption in favour of the place of payment was largely negatived where alternative places are provided for in the transaction. In the present case, however, no option of place of payment as such was given, though there was provision for free transfers to a different register, and the place of register was evidently also the place of payment. Since there were two sets of obligations measured by different moneys of account, the reasons which in many cases serve to rebut the presumption were substantially weakened. The scheme had established a distinction dependent on the location of the register rather than the original place of contracting, and the facilities for transfer must be presumed to have been intended to make available to a creditor the means of transferring from one ' set ' to another with a consequent change to a different money of account.

Though I confess to an inclination of preferring Macrossan C.J.'s order, a difference in point of view on such an issue as this is perhaps not altogether surprising when one recalls that the solution depends on no less tenuous a criterion than a presumptive intention to be gathered a posteriori from the terms and circumstances of a complex and intricate transaction.

J. G. Fleming.

[33] *Per* Dixon J. at p. 542.
[34] [1948] V.L.R. 145.

Recent Cases in South African Private International Law

The Law Governing the Formal Validity of a Will Disposing of Movables

In South African law there is a wealth of authority to show that a will disposing of movables is formally valid if it complies with the requirements as to form of the *lex loci actus*.[1] This, however, is not the exclusive testing law; for it is also sufficient that the will comply with the *lex domicilii* of the testator. The difficulty with the latter test is that it is not clear whether it is the law of the testator's domicile at the time of making the will, or the law of his last domicile.

There are a number of South African cases in which a will disposing of movables was held valid on the ground of compliance with the formalities required by the *lex domicilii*, but all save two are inconclusive as to which of the *leges domicilii* is the governing law, as in the cases other than those two the testator's domicile was the same at the time of making the will and at death.[2] The two cases in which the question did arise for decision were *Re McMillan's Estate*[3] and the recent case of *Ex p. Estate Abbott*.[4]

In *McMillan's Case* the will did not comply with the formalities required by the law of the testator's domicile at the time of execution, nor with the *lex loci actus* (in both cases, the law of Southern Rhodesia). It did, however, comply with the formal requirements of the law of England, where the testator died domiciled. Mason J. refused to recognise the will as valid for the purposes of probate in the Transvaal.

In *Abbott's Case* (the facts of which are not material) Carlisle J., after referring to Dicey, Cheshire and Foote, concluded

[1] The rule was established in the Italian school through the writings of Bartolus, received in France from the support it obtained from Dumoulin, and accepted in Holland. See Barmat, *De Regel 'Locus Regit Actum' in Het Internationaal Privaatrecht* (1936), pp. 29 ff. For Roman-Dutch authority, see Christinaeus, *Practicarum Quaestionum* (1626), I, Decis. 282, and *Commentaria in Leges Municipales Mechliniensis* (1642), 17.1.9 ff.; J. a'Sande, *Decisiones Frisciae* (1635), 4.1.4; P. Voet, *De Statutis* (1661), 9.2.2, 3; J. Voet, *Commentarius ad Pandectas* (1704), 1.4.Pt.II.13, 14; J. Huber, *Hedendaegse Rechtsgeleerdheyt* (1686), 2.20.5; Schomaker, *Selecta Consilia* (1738–65), 26.12; Schorer, *ad Grotius*, Note 110; van der Keessel, *Theses Selectae* (1800), Th. 39, and *Dictata ad Jus Hodiernum secundum H. Grotii Introductionem* (ed. E. M. Meijers) (Haarlem, 1939), Th. 39 (para. 55); *Utrechtsche Consultatien* (1671), I, c. 123, n. 17. There is only one South African decision exactly in point—*Ex p. Heymann, N.O.*, 1935 W.L.D. 100.

[2] See *Wilkinson* v. *Estate Wilkinson* 1907, 24 S.C. 602; *Ex p. Blenner-Hasset* 1931 N.P.D. 585; *Ex p. Tarr*, 1941 C.P.D. 586. In *Ex p. Allison*, 1940 C.P.D. 586 (a case presumably concerned with movables), the court purported, however, to apply the law of domicile at the time of making the will.

[3] 1913 T.P.D. 198.

[4] 1950 (3) S.A. 325 (N).

that a will which (it was assumed) was in compliance with the formal requirements only of the *lex ultimi domicilii*, was valid.

It appears, then, from a study of the decided cases in South Africa, that there is one case (*McMillan's*) which states that a will formally valid only by the testator's *lex ultimi domicilii* will not be recognised by a South African court; and one case (*Abbott's*) to the opposite effect. There is no case on the question whether a will formally valid only by the *lex domicilii* of the testator at the time of its execution will be recognised by a South African court.

The basis of South African law is Roman-Dutch law; and since the opinions of the Roman-Dutch writers are not canvassed in any of the decided cases, an investigation into their views is necessary to see whether they shed any light on the problem here propounded.

In the mid-seventeenth century van Zutphen, in his *Practycke der Nederlandsche Rechten*,[5] states that a change of domicile, according to the views of some of the Doctors, does not affect the validity of a previously validly made testament, albeit that it is in conflict with the law of the place where the testator has since become domiciled. He goes on to point out, however, that this view has been contested and the question decided by others to the contrary. It appears from one passage [6] that he is speaking, *inter alia*, of formalities.

Peckius,[7] another mid-seventeenth century writer, would appear to favour the validity of a will in compliance with the formalities of the law of domicile at the time of making the will,[8] and it is possible to read into certain remarks of J. Voet [9] that he takes the same view. None of the three authors here cited, however, state that a will valid according to the formal requirements of the *lex ultimi domicilii* is invalid because it does not comply with the forms of the law of domicile at the time of execution or the *lex loci actus*.

There are two writers who appear to favour the law of the last domicile as the exclusive testing law (apart from the *lex loci actus*). But Carpzovius,[10] the first of these, deals really with a

[5] (1645) ad Domic., No. 7, and ad Testament., No. 1.
[6] Ad Testament., No. 1.
[7] *Tractatus de Testamentis Conjugum* (1647), 4.37.
[8] He would appear, however, to have been incorrect in characterising the problem he was dealing with, as one pertaining to formalities. The question was the right of spouses to make bequests to each other without the consent of the children, and seems to concern the intrinsic validity of a will, rather than formalities.
[9] *Op. cit.*, 1.4. Pt. II, 15.
[10] *Definitiones Forenses* (1644), 2.14.3.

case of essential validity of a will,[11] and his view that the *lex ultimi domicilii* governs is unexceptionable, but not applicable to the question of formalities.

There remains a passage in the *Dictata*[12] of the other of these writers, van der Keessel, one of the last and greatest of the Roman-Dutch authorities. In this passage he states that when a *propositus* changes his domicile to a new country, and dies there, the law of the latter place governs testamentary and intestate succession to his movables. It was on the basis of this rule, he writes, that a famous decision was made in the province of Overyssel, concerning a testatrix who had made a testament in the province of Holland (where she was then domiciled) in the proper form, before a notary and two witnesses. The testatrix thereafter changed her domicile, to Overyssel, where she died. In the domestic law of Overyssel a testament in this form was invalid. Jurists disagreed as to the validity of the testatrix's will; but the majority held it to be invalid, inasmuch as it took effect only from the time of the death of the testatrix. The court of Overyssel decided to the same effect.

At first blush this '*decisio celebris casus*' appears to be decisively in favour of *lex ultimi domicilii* test. Closer examination, however, shows it to be passing strange, for the will was in any event valid according to the *lex loci actus*, that of Holland. It would appear that the decision might have turned on a peremptory statute of Overyssel.[13] Certainly it affords no ground on which to base a confident opinion as to the prevailing view at the end of the Roman-Dutch period.

Thus, unfortunately, it is impossible on a review of the writings of the school of the statutists to come to any conclusion of the problem of the law governing the formal validity of a will disposing of movables. The matter must then be decided on principle.

The Anglo-American common law doctrine is that the law of the last domicile of the testator is the testing law for the formal

11 Whether a will can be made to the prejudice of nearest cognates.

12 *Dictata ad Jus Hodiernum Hollandicum et Zelandicum secundum H. Grotii Introductionem.* The *Dictata* have not been published as a whole. In 1939, however, appeared *Tractatus de Vi et Potestate Statutorum Ratione Personarum Rerum et Mixtim*, edited by Professor E. M. Meijers (Haarlem). The passage here considered is Thesis 42 (para. 77 of the book).

13 Cited in Thesis 39 (para. 56) of the *Dictata*. The statute laid down that a domiciliary of the province had to comply with the formal requirements of the law of Overyssel, no matter where he made the will. Possibly this was construed by the court of Overyssel as having retrospective effect, and thus applicable to the will of the testatrix in the case in question. But one can never be sure how far the courts of the Netherlands at that time took statutes into account.

validity of a will disposing of movables.[14] The authority for this rule usually given is the speech of Lord Wensleydale in *Bremer* v. *Freeman*[15] in which, basing himself in the *mobilia sequuntur personam* doctrine, he stated that the Board of the Judicial Committee of the Privy Council did 'not wish to intimate any doubt that the law of the domicile at the time of the death is the governing law (see Story, *Conflict of Laws*, s. 473)'.[16]

The common law rule is justified by Cheshire in the following words:

> 'As pointed out in a leading American case, the essence of a will is that it is ambulatory until death, a mere inchoate transaction having no legal significance and creating no vested rights until consummated by death. If it were complete upon execution it could not, of course, be affected by a change of domicile, but since it does not become complete until death it is necessarily affected by that system of law which governs the testamentary dispositions of the deceased'.[17]

It might equally be said, however, that the critical time for testing the adequacy of solemnities observed in the performance of a legal act, should logically be held to be the time when the legal act was performed. Furthermore, to hold that a will is invalid if it does not comply with the law of the last domicile or the *lex loci actus*, although it was in the form required by the domiciliary law of the testator at the time of execution, may produce unsatisfactory consequences.[18] To have to hold that if a

[14] Story, sec. 743; Phillimore, *Commentaries on International Law*, 3rd ed. (1879–89), IV, pp. 627–8; Dicey, *Conflict of Laws*, 6th ed. (1949), Rule 180 (p. 821), Rule 181 (p. 822), but cf. p. 839 n. 4; Cheshire, *Private International Law*, 3rd ed. (1947), pp. 684, 688–9; Wolff, *Private International Law* (1945), sec. 559 (p. 594); Schmitthoff, *English Conflict of Laws*, 2nd ed. (1948), p. 229; Falconbridge, *Essays on the Conflict of Laws* (1947), pp. 112 ff.; *Restatement*, sec. 306, esp. comment (*d*), p. 338; Beale, *Conflict of Laws*, (1935) II, sec. 306; Goodrich, *Conflict of Laws*, sec. 164; Lorenzen, *Selected Articles on the Conflict of Laws* (1947), pp. 234–5. Likewise Bar, *Private International Law* (1892), trans. Gillespie, p. 814.

[15] (1857) 10 Moo.P.C. 306 at 359.

[16] The reference to Story, sec. 473, is rather inept, for Story based his conclusions on two passages from J. Voet (*op. cit.*, 28.3.12 and 13), where Voet does not deal with the question of formalities at all, but capacity to make a will. The same mistake was made by Barry J. in the unreported South African case of *Re Estate Zarchi*, T.P.D., February 23, 1938, a case to which the author's attention was kindly drawn by I. B. Murray, Esq., B.C.L. The learned judge was commenting on the fact that no reference was made in *McMillan's Case* to this passage in Story.

[17] *Op. cit.*, p. 688. It is significant that when it comes to capacity to make a will disposing of movables, Cheshire (p. 681) favours the domiciliary law at the time of making the will. 'The decisive time for testing capacity is the time when the will was made. . . . No will can be valid unless it is valid when made'. Are not these sentiments equally applicable to formalities?

[18] The Wills Act, 1861 (Lord Kingsdown's Act) was passed to cut down the stringency of the English common law rule. Certain States of the U.S.A. also

South African makes a will in Portuguese East Africa, in a form valid by the domestic law of South Africa, but not that of Portuguese East Africa, that will becomes invalid, if, years later, he changes his domicile to a country by whose domestic law it is formally invalid, is most undesirable: it means that an intrinsically valid testament falls to the ground by a simple change of domicile, although the testator had no intention to revoke.

It is therefore submitted that in South African law a will disposing of movables, formally valid only by the law of the domicile of the testator at the time of the execution, remains valid at the testator's death, notwithstanding any change of domicile.

On the other hand, it is not suggested that a will disposing of movables, formally valid only according to the law of the testator's last domicile, should be held invalid. This would also produce undesirable results. It is hard to imagine that a South African court today would hold that if A made a will in Portuguese East Africa, where he was then domiciled, in accordance with South African form, but not in accordance with the form required by the law of Portuguese East Africa, and then became domiciled in South Africa, and after many years died so domiciled, any interested person could thereafter be heard to claim that A's will was formally invalid. *McMillan's Case*, it follows, was wrongly decided.

It is therefore submitted that in South African law a will disposing of movables is formally valid if it complies with the requirements as to form of the law of the place where it was executed, or the law of the testator's domicile at the time it was executed, or the law of the testator's domicile at the time of his death.[19] It may be argued that it is illogical to uphold the last two tests, since to support any theoretical foundation of the one is to destroy any theoretical foundation of the other. But, as has been said more than once, rules of conflict of laws are not necessarily based on logic. Their underlying purpose is to promote justice and convenience.[20] Cheshire has said, in connection with another case of illogicality,[21] that 'there is much to be said for

provide that a will formally valid according to the *lex domicilii* at the time of execution, is valid at the time of the testator's death, despite a change in domicile. See Lorenzen, p. 237.

19 It is of interest to note that Mulder, *Nederlandsch Internationaal Privaatrecht* (1928), p. 217, setting out the rules of the law of Holland, says that the formalities of a testament are governed by the *lex loci actus* or alternatively by the law of the nationality. He submits that the latter is the law either at the time of making the will or at the time of death.

20 Cheshire, pp. 54–5.

21 P. 115, dealing with the *renvoi* doctrine as applied in *Collier* v. *Rivaz* (1841) 2 Curt. 855.

[a] benevolent rule in the . . . case of formal validity, since it is obviously desirable that the intention of a testator, clearly expressed and not intrinsically objectionable, should be respected if reasonably possible'. These sentiments apply equally to the problem discussed above.

Domicile of Choice of Alien Resident under a Temporary Permit

In a recent issue of this Journal,[22] in a consideration of the case of *Gwambe* v. *Gwambe*[23] the question was discussed whether an alien, resident in a country under a temporary permit which could at any time be cancelled at the will of the Executive, could acquire a domicile of choice in that country. It was submitted than on principle he could not, and that *Gwambe's Case* was wrongly decided. In a later case, however, *van Rensburg* v. *Ballinger*,[24] the full bench of the Transvaal Provincial Division came to the same conclusion as that reached in *Gwambe's Case*, and, save in the event of the Appellate Division deciding differently when the issue comes before it, the rule in South African law seems settled. Legal purists will possibly remain inconsolable on contemplating the logical absurdity of such a temporary immigrant being deemed capable of acquiring the *animus manendi*. Some lawyers, however, may find solace in the consideration that the decision at least cuts down, in one respect, the indefensibly rigorous interpretation placed upon the *animus manendi* principle in the last twenty years or so: for instance, in *Ramsay* v. *Liverpool Corporation*[25] and the South African decision of *Johnson* v. *Johnson*.[26]

Ellison Kahn.

Suggestions for a Convention on Renvoi

Sometimes, though not often, better understanding may score a modest triumph over a preconception. Not long ago, the learned opposition against 'renvoi' ran almost unchecked through all the countries of the globe. The conflicts rules had to refer only to foreign internal law, irrespective of foreign conflicts rules. Now, however, the Netherlands Government consider the time ripe for

[22] 3 I.L.Q. (1950), 572.
[23] 1950 (2) S.A. 643 (T).
[24] 1950 (4) S.A. 427 (T).
[25] [1930] A.C. 588.
[26] 1931 A.D. 398.

an international Convention recognising renvoi, to be concluded at the Seventh Hague Conference on International Private Law, in October, 1951.

The need for an agreement on this matter certainly has increased in recent times. On the one hand an enormous mass of migrations and displacements have multiplied the number of cases where the principles of the personal law clash, one jurisdiction treating the relations of an individual according to the law of the country whose national he is, and the other applying to the same person the law of the State on whose territory he has his domicile. On the other hand, new laws in Italy, Greece, Brazil, Egypt and Syria expressly provide that conflicts rules always refer exclusively to domestic rules, thus yielding to the just vanishing theoretical fashion of yesterday. Fortunately the committee draft of a new French Civil Code recognises renvoi, although perhaps not in full measure. Also the same Surrogate Court of New York, which rendered the much discussed decision in *Re Tallmadge* against renvoi, has espoused this theory.[1]

The initiative taken by the Dutch Government, therefore, is gratifying. It raises the hope that after all the arguments, axioms and intricacies surrounding the famous subject, its positive aspects will at last be clarified. In fact, in midst of all the doctrinal trouble, an elaborate theory of renvoi has never been attempted. How much construction in this field is needed,[2] once the blank negation is suppressed, is aptly shown by the comment and questionary submitted by the Dutch Government. The matter has sometimes invited a kind of playful game, a mathematical 'quiz', and since the delicate questions involved may resist to the improvised efforts of a diplomatic conference, I venture to submit a small contribution to the necessary discussion.

Manifestly the Dutch invitation is conceived as serving uniformity in the operation of renvoi and nothing else. It is not intended to unify the rules of conflict in regard to the local connections used in their references. The Convention does not intend to eliminate the contrast between the various rules of succession to immovables. Neither will it attempt to eradicate the opposition between the principles of nationality and domicile, or that between the personal law and that of the place of contracting in determining capacity to contract. All these subjects deserve strong efforts at unification. But we must understand the exclusive topic to be renvoi.

[1] *Re Schneider's Estate* (1950) 96 N.Y.Supp. (2d) 562, noted above, p. 268.
[2] In this respect, I find myself in complete agreement with the careful analysis of the problem by the editors of Dicey's *Conflict of Laws*, ed. 6, 51 ff.

Not to get lost in the labyrinth of the cases, where renvoi has been, may be or may not be, applied—cases unfortunately never completely collected—, we have to approach the problem in stages. First, the Dutch proposals and my own counter-proposals, both fragmentary, may embody two fundamentally divergent methods of solution. Doubtless, there will still be others. Second, the factual situations which have provoked controversy among writers must be examined, with the addition of a few cases showing the ramifications of the problem. Finally my suggestions will be summarised.

The essence of the Dutch draft proposals is that (i) acceptance of the renvoi should be obligatory, provided that the interested parties have not made an express or implied choice of law, in which case that law shall apply without renvoi; (ii) the *circulus inextricabilis* is to be broken by giving preference to the personal law over the *lex rei sitæ*, and the *lex domicilii* preference over the *lex patriæ*; (iii) foreign law may always be excluded on grounds of public policy.

Tentative Counter-Proposal

1. Subject to the provisions following, where a conflicts rule of the forum declares the law of another jurisdiction applicable to a particular case, it depends on the interpretation of this rule whether it has to be taken as referring also to the conflicts rule of that other jurisdiction concerning the said case.

2. (i) Where a conflicts rule invokes the law of the nationality or the law of the domicile of a person, as the law generally to govern his acts or his property, the case is to be decided according to the law applied by the courts of the jurisdiction referred to.

(ii) If in such cases the conflicts rules of the law of nationality and of the law of the domicile mutually refer each to the law of the other jurisdiction, the law of the domicile applies.

3. A reference by a conflicts rule to the law of another jurisdiction is presumed to include a reference to the conflicts rules of that other jurisdiction, if in the latter jurisdiction the validity of an act of family law, a contract, will, or any other act of private law, made outside of the jurisdiction, is recognised.

4. A choice by the parties of a law to be applied to their transactions is presumed to exclude renvoi.

Examples

For the sake of simplicity, we shall call the forum 'I' and the jurisdictions to which the conflicts rule of the forum refers, successively 'II', 'III', etc.

1. An Englishman, domiciled in Italy, dies in Italy, having movable property in Italy and France. These assets are governed in the Italian courts by the English law of succession, because the English reference to the domicile is rejected in Italy. The English courts, wisely following the choice of law used in the domiciliary court, likewise apply English law of succession. The French courts would 'accept' an English renvoi to their own law of succession if the domicile had been in France. Accordingly, they ought to follow the Italian and English approach. Yet we often hear that the French do not apply 'further reference', which would in this case run from England (II) to Italy (III) and, because of the Italian attitude, back to England.

The Convention, naturally, has the task of persuading Italy that it should 'accept' the reference to Italian law and to assure that France (I) would recognise the further reference from England as the national country (II) to Italy as the domicile (III).

2. A Danish national, domiciled in Italy, dies in England owning movables anywhere. While at present in Italy the national Danish law is applied, because renvoi is rejected, Danish courts, also rejecting renvoi, must apply Italian inheritance law as the law of the domicile.

The Convention, hence, has not only to induce the countries of the national law principle, to apply their own law by reference from the national country, but must also induce Denmark and other countries, devoted to the principle of domicile, to follow the tolerant and sensible English construction of the domiciliary principle. Thus, if Italy persisted in its opposition to renvoi, Denmark would have to apply its own inheritance law. Yet on the ground of the Convention hoped for, both should apply Italian law.

This result (above, section 2) is achieved by a simple generalisation of the present German and Swiss practice on the one hand and the English practice on the other.

3. This answers also the question of what should be held in a third jurisdiction. All courts following the domiciliary principle would observe the solution developed by the English courts; all courts following the nationality principle would recognise the reference from the national country to the domicile. Thus, in the case (1) above, a Danish, American or Brazilian court as well as a Dutch, Polish or Cuban court use the renvoi to Italy.

The renvoi thus described, in fact, does not distinguish between 'back' and 'further'. The only consistent approach by the German Supreme Court ignores any such distinction. Logical and practical justification of the attitude is more amply shown in the

following review of cases presented in the literature as argumenta ad absurdum against 'Weiterverweisung', because they would lead to a 'vicious circle'. Even the Dutch comment starts from the assumption that there is a circulus viciosus and cuts it somewhere. I submit that there should be no such thing as a circle *caused* by 'Weiterverweisung' nor do I believe that as a general proposition preferences should be stated as Art. 3 (3) of the Dutch draft tentatively proposes, *e.g.*, to the domicile of a person over the law of the location of an asset.

4. Regarding immovable assets of a succession a popular example [3] illustrates a vicious circle where a Danish testator, domiciled in England, leaves land in Italy.

For a German court it has been said its own conflicts rule (I) refers for this succession to the national, *i.e.*, Danish law (II) refers to the domicile, *i.e.*, England (III), refers to the lex situs, *i.e.*, Italy (IV), which again applies Danish law (II) and so on in infinitum.

This construction of a vicious circle disappears as soon as Italy is converted to the theory of renvoi. But the case in question contains certain other sources of doubt requiring a much longer discussion than it can be afforded in the present tentative contribution. We should note that a reference to the lex situs, stemming from the old statutory principle of real property, is not quite the same thing as a reference to the law of the domicile (conceived either as personal law or as fictitious situs of movables). English courts, as in *Re Ross* [4] and the recent New York decision in *Re Schneider's Estate* [5] have nevertheless gone all the way of accepting reference back to assure harmony with the conflict law of the situs. The question may be raised whether on the ground of the Convention this generous attitude, now most welcome, should survive. The Dutch Comment on the Draft Proposals mentions a deceased Danish national domiciled in Italy and owning immovables in Denmark. At present, indeed, an English court would be referred to Denmark, situs (II), then to Italy, domicile (III), back to Denmark, nationality (IV), and so on. If by the Convention the opposition between Italy and Denmark is eliminated in favour of the domicile, should a British court apply Italian, the domiciliary, law

[3] Lewald, *Repertoire*, ed. Lapradelle et Niboyet, VII 303, § 52 and in other places.
[4] [1930] Ch. 377; *Re Duke of Wellington* [1947] Ch. 506.
[5] *Supra*, n. 1. I wonder whether Swiss courts really refer succession to Swiss immovables back to the domicile. In any case, the American-Swiss Treaty of 1851, s. VI, is understood instead to apply lex situs, by Anliker, *Die erbrechtlichen Verhältnisse der Schweizer im Ausland und der Ausländer in der Schweiz* (1933) 115 and Schnitzer, *Handbuch des internationalen Privatrechts*, ed. 3, II (1950) 460.

instead of the Danish lex situs? Should it do so even in the case of a British subject? Some authoritative writers favour just this application of renvoi, especially where States II and III use identical local connections, either on the basis of their common conflicts principles or by effect of renvoi. Nevertheless, this point needs a thorough discussion rather than the attempt of a personal solution.

5. Capacity to contract has also been mentioned in the literature.

(a) An American citizen domiciled in Italy makes a contract in Denmark. A vicious circle has been construed by inferring from the German conflicts rule (I) a reference to 'American' law (II); then to the law of the place of contracting, *i.e.*, Denmark (III); to the domicile, Italy (IV), again to American law and so on.[6]

In this case most conflicts principles of American States do refer to the Danish law of capacity to contract. Nevertheless, they do not by any means refer to the domiciliary principle of the Danish law. Therefore no circle and not even a doubt ought to be recognised. Were a German court really to operate that merry-go-round, this court would not apply the prevailing American conflicts rule but violate it.

(b) Under the Geneva conflicts rules, relating to bills of exchange, of 1930, Art. 2 (1), sent. 2, capacity to sign effectively a bill of exchange is determined by the national law, but if this law refers to another law, by the latter. Following certain dicta of draftsmen, Hupka,[7] one of the most competent experts, maintains the proposition that this reference can only be used once to avoid the 'circle', *e.g.*, where an Englishman domiciled in Italy signs (and we add, delivers) a bill in Argentina, England (I) refers to the lex loci situs, *i.e.*, Argentina (II) and the latter under the domiciliary principle to Italy (III), which under the national principle refers back to England, etc.

However, why not construe the English conflicts rule, as requiring application of the domestic law of Argentina? This English conflicts rule would definitely reject the law of the domicile as well as the national law. Whether Argentina applies its domiciliary principle to the capacity of signing a bill of exchange, should be of no consequence. (In fact, Argentina would hardly refuse Argentinian law to a transaction made in Argentina.)

[6] Lewald, 29 *Recueil des cours de l'Académie de droit international*, 1929, IV 596; *Internationales Privatrecht* 15.

[7] Hupka, *Die Vollmacht*, 238. Another, I think, erroneous illustration is given by Hirsch, *Juristische Wochenschrift*, 1930, 1338.

Hence merely the first renvoi should be effective. Yet this does not happen for mechanical reasons, but because the first and leading conflicts rule so determines.[8]

Comment

As illustrated above, the Convention must clearly conceive what it means by prescribing renvoi with international effects; what cases of its application should be obligatory; and to what extent harmony is obtainable thereby.

1. The theory hostile to renvoi simply construed all conflicts rules as referring to domestic rules only and disapproved strongly of rules understanding otherwise. We take it that these axioms are to be overruled. What, then, is their substitute?

Certainly, the desire of the forum to apply its own internal law, potent in the history of this subject, is no suitable foundation. Still lingering on, it has often suggested a renvoi restricted to 'reference back', although 'further reference' is its inseparable sister-institution. Nor is the justifiable desire for harmonious decisions sufficient to explain or to define renvoi.

If we eliminate the prejudice against renvoi without introducing new illusions about what renvoi can help by itself, we are directed towards certain distinctions and complications which, however, are prompted by a common impulse. Renvoi is nothing else than the due method of carrying through the reasonable meaning of a conflicts rule of the form, which leaves to a foreign system the task of regulating certain factual situations.

It would be a bad mistake, indeed, if we inverted the quondam hostile theory into its opposite, by proclaiming that every conflicts rule addressed to a foreign system should depend on the foreign conflicts rules. As far as I see there are situations calling for what may be named absolute or total renvoi; the forum yields the choice of the law entirely to another system. There is another group where a presumption for renvoi may be believed appropriate. And in the rest of the cases renvoi may be discouraged, absolutely or presumptively. Query: can all these cases be enumerated?

2. A general presumption for interpreting conflicts rules as directed to foreign conflicts rules, seems risky. Section 1 limits itself, therefore, to a definition of renvoi, which is indispensable in a convention. The proposed text, however, expresses the basic idea that renvoi is determined by the interpretation of the conflicts rules of the forum. Obvious as this idea is, its consequences have often been neglected.

[8] Writings by Lorenzen, Cheshire and my own.

3. The conflict of the principles of nationality and domicile is the original, classical field of renvoi, and perhaps not accidentally so. For it is easily observed that in the broadest references of particular importance a State declares to yield the ruling over a certain domain to another State. Declaring that a man's capacity to marry, the validity of his adoption, the rules governing his marital property, illegitimate birth of his children and parental relations or the rules of succession to his movable property are governed by the 'law of his domicile', means in the well-considered opinion of English courts, that the State of the domicile will decide what law is applicable. This 'foreign court theory' must not be justified by the doctrine of 'désintéressément'. The competence of the foreign court to select the applicable law is rather positively recognised.

On the side of the jurisdictions devoted to the law of the national country, the analogous recognition is inherent in Mancini's theory from its beginning. It would seem an obvious consequence that the courts on one and the other side should accept the choice of law by the system they regard as competent wherever it leads (section 2). Only, as the elaborate practice of the French, German and Swiss courts and, again, the wise method of the English courts, have taught us, where national and domiciliary laws mutually point to each other—a British subject domiciled in France—harmony is reached by preferring the law of the domicile (section 3).

Continental lawyers do not always realise that this total renvoi is as important where it starts in jurisdictions following the law of domicile, as where it is viewed from the angle of the Continental nationality principle. Nor are they always aware of the necessity of extending this renvoi further. Since the personal law of an Englishman is English law in the eyes of a French court, the English reference to the marriage law of New York where the parties are domiciled, for determining their capacity to marry, must bind also a French court. And even further, if the marriage has been celebrated in Illinois, the American conflicts rule of lex loci celebrationis governing the essential requirements of marriage, is necessarily competent for both English and French courts. There is no way out of this logic and the result is the only practical one.

4. The final text will have to deal, in a special section, with the conflicts rules referring to internal law only. Such rules, it is submitted, are, *e.g.*, the lex situs applied to individual assignments inter vivos, the law of the place of contracting and that of the place of performance. These rules do not commonly mean

that the entire case belongs to the sphere of State. The forum selects for reasons, proper according to its own legislative wisdom, a certain local connection for a limited purpose.

Should we in the future subordinate to this group also the application of the law of the situs to succession to immovables? Doubts have been explained above.

Certainly the group includes those references to a person's domicile that involve specific questions, as contrasted with the fate of a person or his assets. Examples are the rules by which the employment of servants is governed by the law of the place of the master, employment of a broker by that of his own establishment, certain other contracts by the law of the branch of a bank, insurance company or mail order house; or the rule of a Montevideo Treaty that a sea carriage of goods is governed by the law of the maritime agency.

However, it would seem adequate to the function of these rules to be satisfied with a presumption. Sometimes courts have nevertheless resorted to renvoi, *e.g.*, in order to escape their own mechanical conflicts rules, be they lex loci contractus, lex loci solutionis or others. So long as conflicts rules are not radically improved, we ought not to shut off any healthy renvoi.

5. Section 3. In fact, there exist a number of situations in which the validity of a contract, a will and other acts is rescued by applying a foreign conflicts rule, recognising a third law. Lord Kingsdown's Act opens a choice of several connections for justifying the validity of a will as to formalities and capacity. In American statutes analogous references are stated even with respect to domestic immovables. Thus, in principle, land is exclusively controlled by the law of the State in which it is situated, and a will devising the land in X is governed in all respects by the inheritance law of State X; but where in respect to land situated in X a will has been made in State Y, sufficient in form to the inheritance law of State Y, this form is recognised by the statute of State X, and therefore by all jurisdictions referring to the lex situs. Recognition of a marriage as to form and capacity to marry, if tested under the law of the place of its celebration, is treated in the same manner. Also, for the recognition of divorce similar considerations are important, although the proposed convention will not be wanted to affect jurisdictional phases.

In the literature more options in the choice of the law have been advocated.[9] For instance, the form of contract should be

[9] M. Wolff, *Das internationale Privatrecht Deutschlands*, ed. 2, 68.

held sufficient, if a contract made by correspondence formally satisfies the law of either party; or capacity may conform either to the domiciliary law or that of the place of acting. An alternative test includes a possible renvoi.

6. The proposals submitted above do not restrict renvoi either to reference back or to such further reference that leads to two jurisdictions applying the same local connections, as an eminent author has suggested.[9] On the other hand this suggestion implies extension of renvoi to cases where the forum may share in the harmony existing between the jurisdictions successively referred to, a very desirable objective.

The concepts used in the proposals, including domicile, are meant to be defined by the conflicts law of the forum, since the reasonable construction of this law is the guiding element of the submitted theory.

ERNST RABEL.

HIGH ALTITUDE FLIGHT AND NATIONAL SOVEREIGNTY

High altitude rocket flights have reopened an old question: How far upward in space does the territory of the State extend?

If international relations are to be conducted in the future in anything approaching a normal manner, both the statesman and the jurist ought to know the extent to which a State has the acknowledged right to control all activity in the areas of space above its surface territory.

The territory of a State, geographically considered, is a three-dimensional region. It includes an area on the surface of the earth, a sector of the earth below, and a sector of space above. Legally considered, the territory of a State may be defined as those regions in which the State is recognised by international law as having the right to exercise national sovereignty to the exclusion of all other States. As the distinguished jurist Max Huber said, in his opinion in the Island of Palmas arbitration between the United States of America and the Netherlands: 'Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein to the exclusion of any other State the functions of a State. . . . Territorial sovereignty . . . involves the exclusive right to display the activities of a State'. Among these territorial functions are included the right of a State to determine the extent to which it will control and police human activity within its territory.

The legal concept that a State has territorial rights above the

surface of the earth is far older than the discovery of the art of human flight. Rome did not hesitate to control the use of space whenever deemed necessary to protect public or private rights on the surface of the earth. The airspace over public highways and over sacred ground was kept open by law. The Roman emperors limited the height to which buildings could be erected. Private rights in space above the landowner's property on the surface were carefully protected. The Roman State made its laws as effective above the surface of the earth as it did on the surface. The great jurists of a much later era fully recognised the existence of State sovereignty in space. Pufendorf, for example, in the latter part of the seventeenth century remarked that 'since man has been denied the ability to be in the air to the extent that he rest in it alone, and be separated from the earth, he has been unable to exercise sovereignty over the air except in so far as men standing upon the earth can reach it'. To Pufendorf sovereignty in space was thus limited by the ability for effective control, and not otherwise.

With the discovery of the balloon in 1783 and the gradual development of the art of man-controlled flight culminating with the Wright brothers' achievement in 1903, man found a way 'to be in the air to the extent that he rest in it alone', and the problem of the extent of State sovereignty upward became acute. In analysing this period it must always be remembered that neither statesmen nor lawyers conceived of the possibility of man-made flight through space beyond a region where there would be sufficient air to support a flying machine of the general nature of a balloon or airplane. So in 1906 when Professor Westlake, at a meeting of the Institute of International Law, first put into concrete legal form the doctrine of State airspace sovereignty, he added that there was no limit upward of such sovereignty. Discussing the necessity for State control in the air over its territory, he said: 'In the air the higher one ascends, the more damage the fall of objects will cause on the earth. If there exists a limit as to the sovereignty of the State over the oceanic space, none exists for the sovereignty of the State over the airspace. The right of the subjacent State remains the same whatever may be the distance'. It is perfectly obvious that Westlake assumed that the State had territorial rights in space as high as flight could exist, but at the same time he assumed that such flight must take place in what he termed 'airspace'.

In 1911 the British Government prepared a draft statute entitled 'Aerial Navigation Bill' which, in its preamble, recited that 'the sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air superincumbent on

all parts of His Majesty's dominions and the territorial waters adjacent thereto'. Again it was assumed that if the State had sovereignty 'over the air', it had the right to regulate all flight over its lands and waters.

Whether the term 'air' or the term 'airspace' was used, the basic idea was the same. In the first great international legislative enactment of the fundamental principles of air law, the Paris Convention of 1919, Article 1, stated that 'The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the airspace above its territory'. The convention then proceeded to the regulation of the use of 'aircraft'. In the Annex to the convention, adopted shortly after it came into effect, aircraft were defined as comprising 'all machines which can derive support in the atmosphere from reactions of the air'.

The Paris Convention was a statement of long existing and fully recognised State sovereignty over a region called 'airspace', but otherwise undefined, in which 'aircraft' might operate. But the Paris Convention is not to be construed as meaning that in international law States have territorial rights only in this airspace. The airspace was accepted as part of State territory but no international determination was made as to the regions of space above. The same argument can probably be made with reference to the domestic law of various States not parties to the Paris Convention which asserted sovereignty over the 'airspace'.

It might be argued that the Paris Convention, and certain other conventions, asserted State sovereignty in the earth's 'atmosphere' beyond the regions where sufficient air exists to support the flight of aircraft as defined in the Paris Convention. Both the French and Italian versions of the Paris Convention use language in Article 1 which literally translated into English means 'atmospheric space' (French: espace atmosphérique; Italian: spazio atmosferico). My own view has always been that these terms were intended to mean exactly what the English version meant, namely, the region of space where the 'air' was present in, it must be assumed, sufficient quantities to support flight in the balloons or airplanes which were regulated by the convention. This argument is supported by the fact that the Madrid Convention of 1926, signed by Spain and various Latin-American countries, referred in Article 1 to sovereignty over 'atmospheric space' (espacio atmosférico); while in the Havana Convention of 1928, signed by many of the same States, State sovereignty is recognised over the 'airspace' (official Spanish text: 'espacio aéreo'). Although, as will be indicated hereafter, the earth's atmosphere from the purely scientific point of view extends much further above the surface of

the earth than does the region in which ' air ' is present in sufficient quantities to maintain aircraft flight, it would seem that in the Paris, Madrid, and Havana Conventions the terms ' airspace ' and ' atmospheric space ' must be considered as synonymous, constituting legally a recognition that every State has territorial rights at least through these regions where sufficient gaseous air is found to support such flight.

This view is further borne out by the fact that the Chicago Convention of 1944, now in force, states in Article 1 that ' The contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory '. While the convention recites that French and Spanish texts were to be drawn up and opened for signature, this was apparently never done and the English text is still the only text which was officially signed. In the French translation of the convention which is ordinarily used, so I am advised, the English word ' airspace ' has been translated as ' espace atmosphérique ', while in the Spanish translation distributed by the International Civil Aviation Organisation it has been translated as ' espacio aéreo '.

It may, therefore, be said that international law now answers the question ' How far upward in space does the territory of the State extend? ' as follows: The territory of the State extends upward *at least* as far above the surface as to include a region which can be roughly defined as ' airspace '. And international law contains no presently accepted rule as to whether usable space above and beyond the ' airspace ' is or is not part of the territory of the State below.

It is at this point that high altitude rocket flights open unsolved legal and political problems. As long ago as the spring of 1949 it was disclosed in the public press that a two-stage rocket had reached a height of at least 250 miles (400 kilometres) above the surface of the earth. This rocket passed far above the region which can, under any theory, be described as ' airspace '. The question is: Did it pass out of the territory of the State below when it left the airspace, and re-enter that territory on returning; or was it at all times within the territory of the State below?

Before even suggesting an answer it is necessary to consider very briefly certain of the scientific views now generally held as to what constitutes the earth's atmosphere. This atmosphere is usually described as constituting four gaseous layers known as the troposphere, stratosphere, ionosphere, and exosphere. The troposphere is next the earth and the exosphere is the far distant region which gradually merges into outer space. The ' airspace ' is part of the lower atmospheric region. The troposphere extends upward

about 54,000 feet (16,200 metres) at the equator, and 28,000 feet (8,400 metres) at the poles. It contains about three-fourths (in weight) of the gases composing the earth's atmosphere, and is characterised by steadily decreasing temperatures with increase of altitude. The stratosphere extends from the upper level of the troposphere to about 60 or 70 miles (100 or 115 kilometres) above the earth's surface. It contains slightly less than one-fourth (in weight) of the earth's atmosphere, is characterised by constant temperature of about minus 67 degrees Fahrenheit (minus 55 degrees Centigrade) for part of its area, then a rapidly increasing temperature up to about 170 degrees Fahrenheit (77 degrees Centigrade), then decreasing again to about minus 28 degrees Fahrenheit (minus 33 degrees Centigrade).

The ionosphere extends from the upper levels of the stratosphere to approximately 400 miles (640 kilometres) above the surface of the earth. It is said to be characterised by the existence of what have been termed by some authors as ' free electrical discharges '. The temperature is estimated to increase steadily up to approximately 4,000 degrees Fahrenheit (2,200 degrees Centigrade).

The exosphere is the fringe area beyond the ionosphere in which the density of the gaseous atmosphere is even less, and is supposedly characterised by a uniform temperature of approximately 4,000 degrees Fahrenheit (2,200 degrees Centigrade).

It will be seen from the foregoing that the rocket which reached 250 miles (400 kilometres) above the surface of the earth was high up in the ionosphere. It was far past any region that could be termed ' airspace '. It is generally believed that above 60 miles beyond the earth's surface (approximately 100 kilometres) what we would term a vacuum exists and that all of the aero-dynamic requirements for flight which result in the ' lift ' of a normal type of aircraft have disappeared. It may be recalled in this connection that no airplane has ever flown at more than approximately 60,000 feet above the surface, while sounding balloons have probably reached an altitude of 120,000 feet—both of these distances being far below the theoretical absolute outside limit of what might be termed ' airspace '.

Scientific investigation and progress in known rocket flights have therefore demonstrated that none of the international legislative procedure set up in the Paris and Chicago Conventions applies in a very large part of the region which these rockets have already reached. Future scientific progress makes the problem even more difficult. Rockets now in use are leaving the earth's surface at speeds of at least 5,000 miles per hour (8,000 kilometres). It has

been estimated that if this speed could be increased to approximately 25,000 miles per hour (40,000 kilometres) at the limit of the atmosphere, power could then be shut off and the rocket would continue moving upward indefinitely. Certain scientists believe that these speeds can be attained with fuels now available, although at very great cost; others believe that new methods of propulsion may be required. A well-known astronomer indicated to me that the point at which such a rocket would leave the earth's area of attraction and pass into the gravitational control of the sun would be approximately 161,000 miles (256,000 kilometres) above the earth's surface. It is well to bear that figure in mind because if we hold to the old classic legal theory, as stated by Westlake, that a State must have sovereignty as high up into space as necessary to protect itself from 'falling' bodies, then perhaps the State's territory is 161,000 miles in height.

But the problem is even more complicated than this. If a rocket or other controlled missile can take off from the earth with a speed of approximately 17,500 miles an hour (26,400 kilometres), it will be able to proceed upward for several hundred miles and could then be deflected off of its course so as to be aimed somewhat parallel to the surface of the earth, the power could be turned off, and the rocket would continue on a course around the earth as its momentum would approximately balance the earth's attraction. It would become an artificial satellite. From the international lawyer's point of view the question then arises: Does such an artificial satellite, flying several times per day around the earth and passing far above the surface territories of many States, enter and leave the territory of each of such States when immediately above their surface boundaries? If we accept the theory that the territory of the State extends as far upwards into space, even though that space be a vacuum, as required to prevent the entry of man-made activity which may result in injury to persons and property on the surface territory of the State, then we must assume that such a satellite is violating the sovereignty of every State below which has not consented in advance to its passage. There are scientists who believe that such a satellite can and will be constructed before many years have passed.

It is obvious that it is the duty of the trained jurist to suggest an answer to these problems. It may be that a new international convention is required which will include some sort of agreed limitation on the extent to which States will engage in high altitude flight, similar to Article 8 of the Chicago Convention which provides that no *aircraft* capable of being flown without a

pilot shall be flown without a pilot over the territory of a contracting State without special authorisation by that State.

In the absence of such a new convention, basic legal theories must be re-examined and the practical questions at issue must be understood.

In the first place it is obvious that we must agree that there is an upper boundary in space to the territory of the subjacent State. Under no possible theory can it be said that a State can exercise sovereign rights in outer space beyond the region of the earth's attraction. The arguments for State sovereignty in space have always gone back to the proposition that it is both the right and the duty of the State to protect itself and that on no other basis can such protection be considered adequate except that it have the right to control, as part of its territory, those regions above it which, if used by other States, may bring damage and loss to persons and property on the State below. Carrying this old rule to its extreme, the outer boundary of the State cannot be further than the point where the earth's attraction will govern the movement of an object in space so that such object will 'fall' onto the earth.

On the other hand, this boundary cannot be lower than the upper limit of the airspace. The rule of international law—that the territory of the subjacent State includes at least the region above it known as airspace—need not be challenged. In other words, it would appear that the upper boundary of the State's territory lies at a point between the upper limit of the 'airspace' and the upper limit of the earth's attraction. Somewhere in this vast intervening region the rights of the State below cease to exist as against other States.

Certain jurists have insisted that the territory of a State is limited by the ability of that State to make its law effective. This is a harsh rule when applied to sovereignty in space. The richest and most powerful States now have means through high altitude rockets to control more or less effectively the 'airspace' over their surface territories. But the weaker States have no such power. Can we be said to live in such a world where the physical power at any one time of any particular State determines its *international right* to consider the region above its surface territories as part of its national territory? I may say here that my own belief is and has always been that if the rule of effectiveness is to be applied to determine the limit of State territory in space, then the rule should be that every State, no matter how small or how weak, as a State of equal sovereignty with every other State, has and should be admitted to have territorial rights

upwards above its surface territories as high as the rights of every other State no matter how powerful.

Perhaps the rule should be, in the absence of international agreement, that the territory of every State extends upward as far into space as it is physically and scientifically possible for any one State to control the regions of space directly above it. In considering the possibility of adopting such a rule as this as part of international law, its limitations must be understood. The enormous distances involved must not be forgotten. Assuming that a State has acquired the use of a rocket that will leave the earth at the suggested speed of 25,000 miles per hour, it must be remembered that as it moves upward it will be continually slowed by the earth's pull. Therefore it would take a rocket travelling at even this tremendous velocity well over six hours to reach the theoretical distance of 161,000 miles beyond the earth's surface, at which point it enters into the area where the sun's attraction begins to predominate.

By the time that the rocket reached this far distant region, for the purpose of policing or controlling its use by other States, the rocket may have itself passed through the theoretical territory of several States. It must be recalled that the earth itself is rotating. If this rocket is driven directly upward, it may not be directly over the territory of the State which fired it for a very long period. Any theoretical possibility of a State controlling far distant regions in space is absolutely out of the question. I am convinced that we must abandon the theory that the State has the right to claim territory out into space as far as the earth's attraction extends, and that we must admit some such reasonable rules as I have suggested above—namely, that at any particular time the territory of each State extends upward into space as far as then scientific progress of any State in the international community permits such State to control space above it.

Frankly, this is not put forward as a final solution. It is realised that it leaves open such vital questions as to what extent of control is contemplated, and by what means an international determination will be made of the ability of the most powerful State to extend its control into outer space. In its favour I can only say that it is worthy of consideration; that it provides the basis for a fairly livable world in which the weak State is not at the mercy of the strong.

John C. Cooper.[1]

[1] Member Institute of Advanced Study, Princeton, U.S.A.; Fellow American

THE PRESENT ATTITUDE OF THE ITALIAN COURTS IN RESPECT OF THE RECOGNITION OF FOREIGN DIVORCES

Recent decisions of the Supreme Court in Italy in respect of foreign divorce decrees, and a new law which came into effect last year, have given rise to a conflict of laws which will have serious practical effects for Anglo-Italian marriages. I will explain as briefly as possible what is the present situation.

Already for some time, there has been a tendency in the Italian courts (with very few exceptions) to consider that a foreign divorce of two foreign spouses who had celebrated a marriage in Italy according to the Concordant, cannot be recognised in Italy if the wife was of Italian origin. I should explain that the so-called 'matrimonio concordatario' is a Catholic marriage with full civil effect in Italy, as laid down in the Concordat between Italy and the Vatican. The procedure for rendering valid in Italy a foreign decree is called 'delibazione'; the Italian court is asked to recognise and render valid a foreign decree, provided it is satisfied that the decree was pronounced in a regular manner and by a competent court; it does not, however, enter into the merits of the case.

According to the new law, an Italian woman married to a United Kingdom citizen, whose marriage is subsequently dissolved by a divorce, remains tied to the husband in the eyes of Italian law. The husband may then remarry in England, but should the wife do likewise she would, under Italian law, commit bigamy.

This problem raises a question of nationality. According to Italian law, a married woman always takes the nationality of her husband if his national law operates in this way. An Italian woman, therefore, who married a British subject before 1949 lost her Italian nationality. But if she married since the British Nationality Act, 1948, came into force, she has the choice of retaining her original nationality or acquiring that of her husband.

There are then three possible situations in which the Italian woman would find herself after a foreign divorce:

(a) The marriage took place before January 1, 1949. The woman automatically ceased to be an Italian citizen when she married and became British. After the divorce she can remarry anywhere where the divorce is recognised. She cannot remarry in Italy as the English decree will not enable her to cancel her first

Academy of Arts and Sciences; Member Institute of Aeronautical Sciences.

For much of the data as to the scientific characteristics of the upper atmosphere, the author is greatly indebted to the article and chart entitled 'The Earth's Atmosphere', by Howard E. Roberts, *Aeronautical Engineering Review*, Vol. 8, October, 1949, pp. 18–31.

marriage in the Italian register. The question remains as to whether, should she return to Italy, she would be liable to be prosecuted for bigamy. As under English law she remains a British subject this is unlikely, although it may appear contradictory.

(b) The marriage took place after December 31, 1948, and the woman did not acquire British nationality after her marriage. If she marries again after a divorce, as she has always been an Italian subject, she may be prosecuted for bigamy under Italian law.

(c) The marriage took place after December 31, 1948, and the wife subsequently acquired British nationality by registration. After a divorce, she remains British and the position is the same as in (a).

The question arises whether the Italian woman in Case (a) or Case (c) can, should she so desire, reacquire Italian nationality after a divorce. Where the woman acquired British nationality automatically by marriage before 1949, she automatically lost her Italian nationality. The only way in which she could reacquire her Italian nationality after a divorce would be if English law permitted her to renounce her British nationality. English law, however, will permit her to renounce her British nationality only if she is of dual nationality, and this is not the case here. It would therefore seem that she cannot reacquire Italian nationality.

With regard to Case (c), it would appear that the woman's acquisition of British nationality by registration may be considered a voluntary acquisition of such nationality. In this case, she can always reacquire Italian nationality according to Art. 9, para. 2 of the Italian law on Nationality, after two years' continuous residence in Italy.

Chinese Marriage Law of 1949

Although the Chinese People's Republic has annulled all the laws as established by the Civil Code of the Republic of China which were in force from 1912 (Sun-Yat-Sen Revolution) up to the coming into power of Mao-Tse-Tung, there are not many substantial legal differences between the previous and the new legislation. It is interesting to note that the new marriage law passed in 1949 is the first private law to have been introduced by the People's Government which up to now had dealt only with laws affecting public life. In the past a Chinese marriage was a very elastic affair as far as forms were concerned and consequently there was much latitude when marriages came to the point of being dissolved. Marriage was considered an entirely private matter which was of

no interest to anybody except the parties concerned. In order to be legally married it was sufficient to sit in a public place, generally a restaurant or a tea house, where the bride and bridegroom, in the presence of two witnesses and an introducer, would sign a sort of agreement (marriage certificate), whereby both parties undertook to enter into a prosperous and happy life together. The legality of such a certificate, which required no special form, was established by the mere observance of such requirements as the presence of witnesses and introducers and the dating and signing by both parties of the document. There was no need to register the contract of marriage, partly because in the Chinese courts there was no such thing as a notarial department and the only way of obtaining registration of a document was to cause the court to pronounce a judgment.

Nevertheless, there existed a kind of tradition, according to which people used to get married in a lawyer's office where the contract was drawn up, signed and sealed; the lawyer who performed the ceremony was generally invited to the restaurant afterwards.

Under the new laws of Communist China registration of the marriage with the authorities becomes obligatory. Both parties must make a declaration before an official and must satisfy him that they are free to contract marriage and that no influence has been brought to bear upon them. According to Confucius and the old Chinese customs, a widow was not encouraged to remarry. Under the new law she has full freedom to do so. Another interesting feature of the present law is that marriages are no longer arranged by parents who formerly used to settle their children's future soon after they were born.

The old law laid down the minimum age at which a man might marry as eighteen and sixteen in the case of a woman; under the new law their ages have been raised to twenty and eighteen respectively.

The impediments to marriage are almost the same under both laws, chiefly blood relationship, impotence, venereal disease; the impediment of blood relationship has been extended from the third to the fifth degree.

With regard to the moral side of marriage, the new law is interspersed with the inevitable propaganda; it stresses, for example, the obligation to fight together for the establishment of a new society.

Couples are at liberty to retain their old names, as was the case under the old law. There are no changes as far as maintenance is concerned, but the new law allows more freedom in the choice of

a profession and social activities; this can be interpreted as propaganda rather than as a real advance in the emancipation of women.

With regard to property, it is not quite clear what is considered as belonging to the 'communauté'. It is, however, stated that, in case of divorce, the wife's property reverts to her, while the man's property has to be divided. This is undoubtedly an improvement on the old custom of buying a bride and being able to claim from her parents the purchase price in the event of the wife's proving unsatisfactory.

The most interesting feature of the new divorce laws is that a serious desire on the part of one of the parties is sufficient in order to obtain dissolution of the marriage, provided that an unsuccessful attempt at reconciliation was made in court. This was not formerly the case when the grounds for divorce were chiefly the usual ones (desertion, adultery, cruelty, venereal disease) in addition to divorce by mutual consent, which was operated by the drafting of a new contract similar to the contract of marriage, in which the parties stated their wish to put an end to their married life because of certain difficulties which had arisen between the parties. It is also worthy of note that under the new law the husband may not petition for a divorce during his wife's pregnancy or within one year of the birth of a child. However, this does not apply to the wife. Two divorced parties can re-establish their marriage by a simple act of re-registration of their marriage. No one has a right to maintenance, except in cases of dire necessity. As under the old law, the *pars culpabilis* is not entitled to maintenance. All differences concerning the children must be settled in court; it is not, however, clear whether custody of the children is considered a temporary measure, subject to revision, or not. The husband is responsible, even after divorce, for debts contracted by the 'communauté' during marriage. Another interesting feature of the new law is that illegitimate children stand on an equal footing with legitimate children; they are therefore entitled to maintenance upon production of evidence by the mother or any other person.

The question of whether civilisation came from the East has long been a subject of controversy, as has been the question of who are the barbarians, 'the white devils with yellow hair', as the old-fashioned Chinese call us, or the conquering hordes of Gengis Khan and Tamerlan. In order to be able to judge whether the new laws relating to marriage and divorce which have been introduced by the present Chinese Government represent real progress, one would have to be in China to see the execution of these laws. It is impossible to judge from a mere study of the laws whether women have

really been emancipated or whether the Chinese people are still observing their age-old customs, such as marriages arranged by parents at the time of the birth of their children or showing contempt for widows who have been guilty of the crime of outliving their husbands. In theory, however, it can be said that there are substantial differences between the old and the new laws, differences which are more of a moral than a legal character.

P. V. E. Terni.*

Israel in Fieri

In International Law States may establish Sovereignty over a certain territory by the acquisition of an original or derivative title. In the first case their title is independent of any previous title; if they acquire territory by occupation, they enter an international legal vacuum. In the second case Sovereignty is transferred from one State to another State by cession and the subsequent title depends on the validity of the previous title. There may, however, be the case of a State whose title is not derived from that of another State, but who cannot be considered an original occupier of the territory. For instance, one State may renounce its title to a certain territory, but before a succeeding State assumes Sovereignty over it there may be an interregnum which does not immediately fit into the classic conceptions of International Law. The Mandate of Palestine following upon the disintegration of the Turkish Empire is an example. The above question may seem to be of theoretical significance only, but has also certain practical consequences. The answer suggested may help to explain the birth of the State of Israel as an International Person and some of its rights and duties as a new member of the Family of Nations. A short analysis of all relevant facts beginning with the end of the First World War is essential to our examination.[1]

There is no doubt that when under the Treaty of Lausanne, 1923, the Turkish Empire was divested of Sovereignty over Palestine, no legal vacuum appeared, as Sovereignty was transferred to the Principal Allied Powers. The text of the Treaty is less clear here than the Treaty of Versailles where Sovereignty over German overseas possessions is specifically transferred to the

* LL.D., University of Rome.

[1] Quincy Wright, *Mandates under the League of Nations*, 1930; Norman Bentwich, *The Mandates System*, 1930; G. Schwarzenberger, *Das Völkerbunds-Mandat für Palästina*, 1929; J. C. Hales, *The Creation and Application of the Mandate System* (25 Transactions of the Grotius Society, 1939).

Principal Allied Powers (Article 119). But as these Powers proceeded in both cases to the establishment of Mandates, they may safely be considered holders of the titles to all former German and Turkish territories over which they established *joint Sovereignty*. The description of this state of affairs as joint Sovereignty, and not as con-dominium or co-imperium seems appropriate, as it corresponds best to the fact of joint acquisition. In subsequent legal transactions the Principal Allied Powers acted as joint holders of this supreme title, conferring on other States minor titles connected with the Mandates. It is true that Sovereignty was not transferred to a legal person, but the existence of a partnership of Powers, acting through a Supreme Council, was enough to preclude a legal vacuum.

The right to allocate Mandates was vested by Article 118 of the Treaty of Versailles in the Principal Allied (and Associated) Powers. Mr. Hymans in his report on Mandates suggested the following procedure to the Council of the League of Nations [2]: the 'pentarchy' would assign particular Mandates to particular States and notify the Council that these States had become Mandatory Powers. The Council would take formal notice of the consequent status of the Mandatory Powers, which was quite distinct from what it would have been had they, as individual countries, acquired derivative titles to enemy territory by acts of cession. The Council of the League adopted Mr. Hymans' report and requested the Principal Allied Powers to allocate Mandates; to inform it of the frontiers of the mandated territories; and to communicate to it proposed terms and conditions of the Mandates. It follows that neither the League of Nations nor the Mandatory Powers acquired Sovereignty. But what happened after the dissolution of the Supreme Council of the Principal Allied Powers? In dealing with the aftermath of war, they had acted as a *partnership* of Powers. Upon the disappearance of the Supreme Council they ceased to act jointly as a partnership, though they did not transfer to any other authority Sovereignty over the mandated territories. Supervision and control of the administration of the Mandates remained, however, with the League of Nations, though the existence of Mandates was not dependent on the existence of the League itself.[3]

The Mandate of Palestine states clearly that the Principal Allied Powers had entrusted the Mandatory Power with the administration (minor title) of the mandated territory and had agreed that the latter should be responsible for putting into effect

[2] J. C. Hales, *op. cit.*, p. 125.
[3] See opinion of International Court of Justice on Status of South-West Africa.

the Balfour Declaration concerning the establishment in Palestine of a national home for the Jewish people. The function of the League was to define the limits of authority, control and administration and this the League did in the various provisions of the Mandate; inter alia, a Jewish agency was created to co-operate with the Mandatory Power. The Mandatory Power acquired the right of internal administration and of control of the foreign relations of Palestine, but it could neither alienate nor lease any of its territory, this being an attribute of Sovereignty (Article 5).

By Article 22 of the Covenant of the League of Nations the national communities in the class of mandated territories were recognised as potentially independent nations, over which the Mandatory had to exercise a temporary tutelage as a sacred trust of civilisation. We may dismiss at once the theory of some international lawyers that Sovereignty was vested in these communities.[4] All that our generally accepted rules of International Law entitle us to assume is the existence of a community; only when it became possessed of a defined territory and an established government, could it be recognised as a new International Person. The conception of trust was often mis-translated and misunderstood. If we attempt to apply the English institution of trust, we must look for the holder of the nominal title (trustee) and for the beneficiaries. The nominal title of Sovereignty was vested in the Principal Allied Powers who did not confer directly any rights upon the beneficiaries (the communities). Thus the Mandatory Powers could only be regarded as trustees of the right of administration, as this was the only right vested in them.

One of the Principal Allied Powers, the U.S.A., not being a member of the League of Nations, entered in December, 1925, into a special agreement with the Mandatory Power in Palestine. The rights of U.S. nationals were secured in the agreement, and the Mandatory Power undertook to send to the U.S. Government copies of its reports to the League. The other Principal Powers were members of the League.[5]

The link between the League and the 'pentarchy' did not, however, affect the distinction between the supreme title and the minor title and did not alter the fact that their holders were different. The dissolution of the League did not affect the existence of the Mandate as such, but only its supervision, as is confirmed by the opinion of the International Court of Justice upon the status of South-West Africa.[6]

[4] Stoyanowsky, *La théorie générale des mandats Internationaux*, 1925.
[5] Norman Bentwich, *op cit.*; Dr. G. Weiss, *Die Entstehung des Staates Israel*, *Zeitschroft für Ausländisches Öffentliches Recht und Völkerrecht*, February, 1950.
[6] *International Court of Justice Reports*, 1950, p. 128.

The above opinion is essential for understanding the interrelationship between the Mandatory Administration and the State of Israel. The Court expressed the unanimous opinion that Mandates survived the League and that Sovereignty was never vested in the Mandatories. No Mandatory Power was capable therefore of transferring the supreme title. It is true that the Principal Allied Powers, the holders of Sovereignty, ceased to act, but lack of action could not result in a legal vacuum. The Mandates of class ' A ' were according to Article 22 of the Covenant to undergo a speedy evolution towards the establishment of new States. It is noteworthy that the Resolution of November, 1947, of the General Assembly of the United Nations, which provided for the establishment of Jewish and Arab States, made a clear distinction between the independence of the new State and its membership of the United Nations. Independence, in other words Sovereignty, is a matter of membership of the Family of Nations, of which the Principal Powers are members. This inner circle of the Family of Nations, which had assumed the shape of a partnership after the First World War, is not now the same as it was before, but this seems irrelevant, as the Principal Powers of the Family of Nations are a partnership with changing membership. Their recognition is always essential for a new State to join the Family. Thus there is no reason to exclude *continuity* of Sovereignty in the case of Israel. Without continuity we would have to accept the alternative, of acquisition of territory by Israel by an original title, which is impossible in the absence of any terra nullius. There remains, however, the difficulty that no actual cession took place and that therefore Israel's title cannot be derivative. We must therefore consider its legal status as sui generis: there was first a transfer of Sovereignty by the Turkish Empire to the Principal Powers as joint Sovereigns. It is this multipartite arrangement that made possible the *release* of Sovereignty to the State of Israel as the final transferee. The conception, favoured by some, of ' revival ' of Sovereignty after the recognition of Israel seems harmless, as long as it does not imply that Sovereignty was previously ' in abeyance ' so that a legal vacuum must be assumed.[7] The latter would destroy continuity, a solution acceptable neither by the Family of Nations nor by the new State whose present rights and duties should as far as possible be linked with the past.

The part played by the U.N. at the request of the Mandatory Power in the last stages of the formation of Israel was important. According to the opinion of the majority of judges of the

[7] *I. C. J. Reports*, 1950, p. 150 (separate opinions).

International Court upon South-West Africa, the U.N. is entitled to exercise certain rights of supervision over the Mandatory Power, though it is not the legal successor to the League. We have seen that this function has nothing to do with the location of Sovereignty. The November Resolution of the General Assembly sought to establish the Statehood of Israel in two stages.[8] It provided for a transitional period between the dates of the Resolution and of the acquisition of independence, that is, recognition of Israel by the Family of Nations with the Principal Powers at the centre. It defined the territory of the Jewish State, the Arab State and the City of Jerusalem. In the first stage of the transitional period the Mandatory Power was to turn over the administration of Palestine to the U.N. Special Committee (U.N.S.C.O.P.), which would have established Provisional Councils of government for the future States. In the second stage, after the termination of the Mandate, the Provisional Councils would have received from the Committee full responsibility for administration though still acting under its supervision and control. Independence would then follow (not later than October, 1948) and the new State 'in esse' apply to the U.N. for membership. In this way continuity of administration would have been secured.

But whereas continuity of Sovereignty was not interrupted, continuity of administration broke down. The Mandatory Power decided to terminate the Mandate on May 15, 1948, and to withdraw from the territory. It did not, however, hand over the administration to the Provisional Councils to be established by U.N.S.C.O.P. or to any other authority. The Statehood of Israel was declared to take effect upon the termination of the Mandate.[9] It was gradually recognised by the main Powers and other countries (de jure or de facto) and applied for membership of the U.N. which was granted by Resolution of the General Assembly of May 11, 1949. The Israeli Government has on different occasions declared that it is not a successor of the Mandatory Power in respect of its rights and duties in what was formerly Palestine. We shall return to this point later.

The State of Israel established effective control first over the area assigned to it under the November Resolution and later over territory lying outside that area. In the first case Sovereignty was established and administration introduced in accordance with the

[8] *U.N. Background Paper No.* 47 (1949); *U.N. Resolution*, Gen. Assembly 181 (II).

[9] N. Feinberg and J. Stoyanowsky, 'Israel's Declaration of Independence' (*Jewish Yearbook of International Law*, 1949).

assignment of the territory by the United Nations, though the procedure prescribed was disregarded. In the second case, that is, in the Negev area and certain other districts, effective control was established, but the question arises whether and how Sovereignty was here acquired. There is no doubt that Sovereignty followed the acts of annexation by reason of the acquiescence of the Family of Nations, but it may be argued that it was title by occupation, since the United Nations had assigned the areas in question to another State. Is the taking of possession by force of the additional areas acquisition of an original title? It is doubtful: the Arab State did not appear at all. We have also seen that until the appropriate International Person appeared in the territory of Palestine to assume Sovereignty, the latter was still vested in the joint Sovereigns acting now through the U.N. Thus where no legal vacuum and no terra nullius can be assumed, no occupation could take place. Interruption in the continuity of the minor title could not affect the supreme title; we cannot argue from developments in the sphere of administration in favour of similar developments in the sphere of Sovereignty. We have seen above that no cession took place, but this does not exclude the derivative character of the supreme title, which may be understood by reference to the special status of the joint Sovereigns acting through international organs.

What then are the international rights and duties of Israel in the light of the above examination?[10] We cannot answer this question in detail as this would lead to a special analysis beyond our present purpose. But it is, first of all, clear that the Israeli Government is not a successor to the Mandatory Power. Part C of the November Resolution (Declaration) provided for continuity of certain rights and duties, but it was never made effective. Under Part C the Provisional Government was to have made, before independence, a declaration assuming the rights and obligations of all international agreements which had been extended to the Mandated Territory of Palestine. In particular paragraph 3a of Part C made provision for the future of commercial concessions granted before November, 1947. These concessions were to remain valid according to their terms, unless modified by agreement between the concession holder and the State. Part E of the Resolution provided that movable assets of the Mandatory Power would be assigned to the new State(s). Immovable assets would belong to the State on whose territory they were situated.

[10] Dr. E. H. Feilchenfeld, *Public Debts and State Succession*, 1931; J. W. Garner, 'Questions of State Succession' (B.Y.I.L. 1938); Francis B. Sayre, 'Change of Sovereignty and Private Ownership of Land' (12 A.J.L. 1918).

In the absence of succession to rights and duties by agreement between the State of Israel and the Mandatory Power we have to turn to general rules of International Law. First of all we must exclude general succession; but certain rights and duties may devolve upon the new State where one International Person follows another in the possession of territory (subrogation). There is, of course, no succession of political rights and duties. As Israel is not a party to previous commercial and other treaties, conventions and agreements, there is no succession to the Mandatory Power in this respect. But local rights and duties connected with the land (jura in rem) devolve upon the succeeding State and so do fiscal property and debts. Further, while public law changes automatically with a change of Sovereignty, private law remains unchanged unless the new Sovereign decides otherwise. There may be also mixed relations based on public and private law, for instance, certain types of concessions. According to press reports [11] concerning the Dead Sea concession on which the Israeli potash industry is based, the State of Israel did not consider itself bound by the concession which was granted by the Mandatory Power to a British company. Such a concession, apart from being an act of public law, contains also some elements of private law such as the lease of the concessionary land. There is no doubt that the concession holder can be deprived of his concession under Israeli public law, but he is entitled to damages for damnum emergens and lucrum cessans. The responsibility of the Sovereign rests on a breach of International Customary Law and if he disregards the rights of the concession holder he is liable as for an international tort. Thus in spite of no continuity of rights and duties based on a transfer of administration, there is continuity of rights and duties connected with the continuity of Sovereignty, and based on well-established principles of International Law, such as the maintenance of private rights, and the permanence of burdens running with the land. Their basis is International Customary Law, including notions of quasi-contract, unjust enrichment and equity.

Thus we must conclude our considerations by assuming continuity of Sovereignty, that is to say a continuous transfer of the supreme title to the territory. We can see no interruption of this continuity, though the link in the interim period between the withdrawal of the Turkish Empire and the assumption of Sovereignty by Israel is sui generis. There was no continuity in the minor title of administration. However, at the time of withdrawal of

[11] *E.g.*, *Neue Zürcher Zeitung*, 7/12 1949, No. 336.

the Mandatory Power the new Sovereign was already at hand. Continuity of rights and duties is provided by general principles of International Law, the breach of which would make the State of Israel a tortfeasor. Thus the case of Israel can in its main aspects be fitted into our system of International Law.

Charles Henry Alexander.[12]

[12] Of Lincoln's Inn, Barrister-at-Law.

BOOK REVIEWS

The Conflict of Laws: A Comparative Study. Volume 3: Special Obligations; Modification and Discharge of Obligations. Ernst Rabel. [University of Michigan Law School. 1950. xlvi and 611 pp. $12.50.]

This book will be fully reviewed in the next number of this *Quarterly*.

Bulletin de Droit Tchécoslovaque public. By Jednota Ceskoslovenskych Pravniku. [Union des Juristes Tchécoslovaques. Année viii, numéro 3. October 1950. 132 pp.]

The authors who have contributed to this issue of a bulletin which was first issued during the war years deserve the gratitude of all lawyers in the Western World. Czechoslovakia is shut off from the West not only by the Iron Curtain but also by its language or languages which only very few comparative lawyers master. A publication giving full and up-to-date information on the development of the law in Czechoslovakia in French (with summaries of the main articles in English) can therefore be sure to find many interested readers in the West.

It is fortunately doubtless that the present publication is in no way inspired by the desire to propagate the new institutions introduced in Czechoslovakia by the present régime. On the contrary the authors have stated the contents of the law introduced during the last few months in Czechoslovakia with a frankness and clarity which deserves to be noted. The general picture which the reader gains is that the methods of modern dictatorship in Czechoslovakia today are not very different from those which were applied in that unfortunate country a few years ago under the dictatorship of the Nazis. The part played by the public prosecutor in civil proceedings, the eclipse of the free legal profession, the transfer of judicial functions to the administration, the stress laid on what is euphemistically called the 'educative function' of criminal law, the complete identification of the welfare of 'the people' with the interests of the ruling group—these and countless other features of the new law are entirely identical with innovations introduced in Germany and elsewhere by Nazi legal doctrine. In fact, not only the contents of the new legal provisions, but sometimes their very wording would appear to follow faithfully the model set by the earlier dictatorship. Whether—as is the case in Eastern Germany—the leading group includes experts

who have served other masters before, whether there has been a conscious borrowing from precedents or whether the similarity is simply due to the fact that a dictatorship fighting for its life against the large majority of a nation has only a very limited number of means at its disposal by which to establish and maintain its supremacy, may safely be left to the historians to decide.

A systematic comparison of the legal rules by which contemporary dictatorships secure their power position has for long been a task which should attract comparative lawyers and sociologists. There have been a number of valuable studies devoted to Fascist dictatorships including not only Fascist Italy, Nazi Germany, Franco Spain, but also the most instructive period of the Gomez régime in Venezuela and dictatorial régimes in other South American countries. The inclusion of Communist dictatorships in the purview of such studies has only recently become possible owing to the linguistic difficulties which most comparatists are met with, when turning to Russia and her satellites. Publications such as those which now appear in Eastern Germany and as the present bulletin must therefore be regarded as a most welcome addition to a type of legal literature which will be found valuable long after the law which it describes will have passed into oblivion.

E. J. Cohn.

Traité élémentaire de droit civil comparé, introduction à l'étude des droits étrangers. René David. [Librairie Générale de droit et de jurisprudence, 1950. vi and 556. No price quoted.]

Professor David is one of the most versatile comparative lawyers of our time, and this volume reflects the range of his learning in the principal systems of law, and in the Romanic, Germanic and Slavonic languages.

The Bibliography extends from pp. 453 to 541, and covers the principal works of authority in the world's legal systems—a feature of real value to international lawyers concerned with 'the general principles of law' and to those concerned with the conflict of laws.

The full lists of textbooks, cases and statutes, are comprehensively set out under headings understandable to any one versed in the civil law. The references to the legal literature of the U.S.S.R. alone cover pp. 541–553. The last two chapters of the book contain a complementary account of institutions and libraries (as well as of their publications) dealing with comparative law. The dangers attendant upon mere literal translations of foreign law are, however, rightly pointed out at p. 435; an English statute must not, for example, be mistaken by a Continental lawyer for a code. Anyone who works through the first part of the book will be in no danger of any such false simplification; for Professor David, as for Professors Gutteridge and Lawson, comparative law

is a scientific method (p. vi) not a dilettante's hobby (p. 25), and nowadays every lawyer who is on top of his job must from time to time resort to this method (p. 34): there were two million refugees in France alone before the war (p. 40), and since then there has been an enormous dispersal of those euphemistically called 'displaced persons'. Political and economic upheavals in one country (p. 43) inevitably have repercussions elsewhere; standard forms and uniform laws are not only still in their infancy, but even subject to varying interpretations in different places. Thus, a knowledge of foreign law often becomes a necessity nowadays. It may be doubted, however, whether the French 'certificat de coutume' (p. 53) is really the best way of proving foreign law. There is indeed much to be said for the English way of producing a foreign practitioner in court: though this is not always possible, and is always costly.

Chapter V on the unification of law is full of common-sense, and of the practical knowledge which the author gathered during his three years as assistant general secretary of the International Institute for the Unification of Private Law, in Rome and later as one of its valued 'experts juridiques'.

The Institute itself is described at pp. 402–5. The author realises the difficulties of the problems of unification, but does not despair of something being possible if done by countries of similar civilisations. The present consideration of the Institute's draft on Maintenance Orders by the I.L.O. and the practical interest shown in the draft uniform law of International Sales of Goods by the Netherlands Government, must be encouraging to the Institute.

It is the main body of this work with which the general reader will be particularly pleased. The six chapters of Title II deal respectively with the six great legal groups of the world in six masterly 'tours d'horizon'.

The French group covers the European and Latin-American countries that have followed the French codes as well as the German law, for the German civil code is even more Roman in spirit than the French (p. 247) though it marks a modern reaction against the excessive individualism of the French Code of 1804 (p. 251). The French division of the Civil and Commercial Codes, followed by Germany, has now been dropped in Switzerland and Italy, whose systems are therefore more understandable to English lawyers unfamiliar with the conception of the 'commerçant' and the 'registre de commerce'.

It will be interesting to see what Professor Meijers makes of the new Dutch code to replace that based on the code Napoléon, and what comes of the projected unification of the civil law of the Benelux countries (p. 254).

Anglo-American law has a chapter to itself, and this is well done, the essential difference between English and French law is the difference between the historical and the rationalising approach

(p. 290). Incidentally 1861 at p. 274, should be 1891, and of course, mercantile custom is an exception to the 1189 rule (p. 272).

Soviet law is a Marxist-Leninist system written in Roman law terms (p. 318) with the unity not the separation of powers as its keynote (p. 323); the executive in fact seems to be supreme. The part in which Professor David deals with the relations between the great State controlled trusts within the general framework of an imposed five-year economic plan is particularly novel and useful; it could only have been done by a lawyer with his knowledge of Russian and Russian sources. These bodies make contracts like other capitalist institutions, but their value is largely a psychological one (p. 328). If a director is saddled by the plan with a number of contracts which he thinks he cannot execute, he will probably resign with a view to compelling an alteration of the planned obligations; it is wiser to do so than to risk failing to fufil the plan. What sanctions the failure to fufil 'planned' obligations is in fact the discipline of the criminal law to which directors and others are subject (p. 330). Revision of contracts is possible, but involves a modification of 'planning', and there are special administrative arbitral tribunals set up to settle disputes between State organisms (p. 331) on these matters which are bound to occur when plan fulfilment proves impossible. Present-day opinion in Russia is not in favour of a separate and economic law divorced from the civil law (p. 332, note 1). The lessons of Soviet law are not without their importance for other socialist economies (p. 337).

Mohammedan and Hindu law are dealt with respectively in Chapters IV and V, in which the essentially religious basis of each is brought out and the function of interpretation fully discussed : in these systems law and morals tend to be identified. Due attention is paid by the author to the codes given by the British to India (p. 372) who thinks that the British judges gradually formed a truer view of Hindu custom towards the end of the nineteenth century. Was this because more Indians were raised to the bench then?

The last chapter of this part deals with the Chinese law, on which excellent first-hand work has been done by Professor Escana of Paris. Behind a façade of Western laws the old Chinese Confucianism dominated till recently : will it continue to do so now that the Chinese on the mainland have adopted a Russian-style constitution? This is only one of the many problems which this forward-looking book raises in the mind of the reader. It is a book which deserves to be widely read; it is being translated into Spanish; there should also be an English edition.

B. A. Wortley.

Traité de Droit des Gens. By ROBERT REDSLOB. [Paris. Recueil Sirey. 1950. 473 pp.]

PROFESSOR Robert Redslob's treatise on the Law of Nations is not the first work of this distinguished lawyer, philosopher and traveller, to reach this country. One of his first publications on the Law of Nations (*Das Problem des Völkerrechts*) appeared in Leipzig in 1917 at the time when he was Professor of International Law at the University of Rostock. After the first world war Professor Redslob came to Strasbourg as Professor of International Law and Dean of the Faculty of Law. There, among other works, he published 'The Principles of the Modern Law of Nations', 'The History of the Great Principles of the Law of Nations from Antiquity until the First World War', 'The Parliamentary Regime', and 'The League of Nations'.

Reading his present treatise we have the impression that it is an attempted compromise between the views of the classical school and modern International law. However, this compromise is not in all respects organic, so that some of his divergent opinions stand side by side without really being reconciled or welded. Professor Redslob defines the Law of Nations as a law which governs relations between States for the purpose of co-ordination. The result of the co-ordinative nature of the Law of Nations is its non-imperative character. It is not a law of authority but being the law of a society whose members enjoy freedom of action it is 'pars jurisprudentiæ longe nobilissima'. There are, however, important limitations to this view. Professor Redslob came from Germany to Strasbourg with a strong inclination to German philosophy, particularly to Kant. The idea of the 'Impératif catégorique' finds its expression throughout the whole book. It gives a somewhat Grotian or post-Grotian flavour to his views, though he is able to draw practical conclusions from them. Apart from the law which is adopted by common consent of the Family of Nations and is therefore essentially contractual, there is the law which is immanent in the conscience of the people, the ideal law. The latter has in principle superiority over contractual law and prevails in case of their conflict. Thus if an inter-State treaty violates a rule of the 'droit ideal', it is null and void, *e.g.*, the Russian-German treaty of 1939 concerning the partition and liquidation of Poland. Professor Redslob quotes also other recent political events in support of his views, *e.g.*, the physical and moral compulsion exercised by Hitler against Hacha, the President of Czechoslovakia in 1939 which caused the German-Czech treaty to be null and void on the grounds of defect of consent.

Professor Redslob, who is also a member of the Strasbourg Chapter, discusses the case of the Vatican, to give the reader a deeper background of the Law of Nations. Though the latter

governs relations between States only, the Church being a real power, is not outside the field of International law. It is unlike the State not a corporation, but a society with a sui generis Sovereignty. Treaties concluded between Church and State, though not international, are law inter potestates. They are in the author's view an extension-law of Nations. The creation of the City of Vatican which gives the Pope a miniature State, is overshadowed by his position as Spiritual Sovereign. Readers can draw optimistic conclusions from these considerations, particularly as to potential limitations of the rule of force in the international field.

Apart from its excellent historical introduction the book is divided into three essential parts: (1) General Institutions; (2) Particular Institutions; and (3) Marginal Doctrines. The first part is concerned with the philosophical aspect of the Law of Nations, with its sources and foundations and with its subjects and objects. It is concluded by a chapter on the so called fundamental rights, which the author had discussed previously in his book on the history of the great principles of the Law of Nations (equality of States and all its corollaries). Part two on Particular Institutions is opened by a discussion of Power Politics and concentrates on the fight of International law against war. The author who does not introduce into his treatise a special chapter on International Organisations, here discusses nearly all of them. The two comprehensive International Organisations (the League and U.N.) are examined in detail. Considering the rules of warfare the author emphasises the tragic inter-connection between the development of modern weapons and the law of war. This conflict means a turning point in the history of International law which hopes anxiously for survival in an atomic age.

The law of war is followed by 'social law', in other words the law of co-operation. Professor Redslob adopts here in substance, though not formally, our division of law into community law and society law. His social law is quasi-community law. It finds its expression in the positive co-operation of nations in the field of common functional interests such as postal services, transport, health, trade, etc. Most of our Public International Unions and Specialised Agencies appear in this section. In the final part the so called Marginal Doctrines are examined which constitute a kind of extra-mural section of International law. Here belong the discussion of the Monroe Doctrine, the principle of nationalities, the right of association for the purpose of legitimate defence, the collective duty of securing international justice, etc.

The concluding remarks of Professor Redslob reveal some aspects of International law peculiar to French lawyers. He distinguishes two inter-connected spheres of *public* law, the contractual and the sphere of imperium. Under the feudal regime

as well as in the Holy Roman Empire with its elected Crown, imperium was established in a contractual way. This applies also to the British Commonwealth of Nations in its present stage. The contractual element, though securing freedom of action, renders the imperium weak and undynamic. Whenever imperium prevails over the consensual sphere, more integration takes place. The author quotes as a typical example the conversion of Confederations into Federations (Switzerland, Germany, U.S.A., etc.). The League of Nations and the U.N. are quasi-confederations. Is the development of the latter towards imperium possible on similar lines? Apart from Power Politics there is one great obstacle to integration: the disease of excessive national Sovereignty. Professor Redslob as a good Frenchman calls it 'l'idée de la patrie'.

C. H. Alexander.

International Law Through the Cases. By L. C. Green. [Stevens & Sons, London. 1951. xxviii and 913 pp. 70s.]

Cases on Private International Law. By J. H. C. Morris. [Oxford Clarendon Press. 1951. Second Edition. xxiii and 417 pp. 30s.]

Though it is intended primarily as a companion volume to Cheshire's *Private International Law*, Dr. Morris has raised his casebook in its second edition almost to the status of a self-supporting work on the conflict of laws. He has introduced a thoroughgoing schematic arrangement of the cases and three new sections on characterisation, renvoi and penal laws; and the notes, which in the first edition were immediately related to particular cases, have been expanded into short and pointed essays on twenty-one topics of which the outstanding ones are those on renvoi; the domicile of married women; polygamous marriages; jurisdiction to annul a marriage; the proper law of contract; capacity to contract; jurisdiction over foreign land; Lord Kingsdown's Act; defences to actions on foreign judgments. From this representative list it will be seen that he has laid his finger on many of the sore points of private international law and he does not hesitate to rub salt in on occasion. The notes are of great value, lucid and penetrating if sometimes too rigorously logical. There is little to criticise in his handling and selection of the cases themselves. *Frankfurther* v. *Exner, Ltd.* [1947] Ch. 405, deserved at least a mention in the section on penal laws and a note on the effect of confiscatory laws would have been useful. The judgment of Scott L.J., in *A/s Tallinna Laevauhisus* v. *Estonian State Steamship Line* on the submission of evidence of foreign law is more illuminating than the rather jejune remarks in *Lazard Bros.* v. *Midland Bank* [1933] A.C. 289, chosen

by Dr. Morris. Finally the admirable prefatory statements of law at the head of each case might well be printed together in the table of contents.

Mr. Green's compilation of case material on public international law is also designed as a companion volume to Dr. Schwarzenberger's *Manual of International Law*, but is more dependent upon it. Summary statements of the law in relation to each case or group of cases, and discursive notes have been dispensed with, though page references to Hyde, Oppenheim-Lauterpacht, and Schwarzenberger are given at the head of each chapter. While it would have no doubt been impossible to have notes and at the same time bring together no less than two hundred and nine cases between two covers, some explanation, at least in Part One, of the relation between the cases chosen and the crossheadings would have been helpful; for example, it is not easy to see what light the *Norwegian Claims Case* throws on 'International law and society' and why it was not placed in the second section dealing with 'International law and municipal law'. And, on a minor point of arrangement, of the last three cases in the book, *Curran* v. *City of New York; Kemp* v. *Rubin* and *Sei Fujii* v. *State of California*, the second and last are decisions on international and municipal law in the U.S.A. while the first concerns the immunities of international organisations and officials; none of them appear to throw light on the law of 'comprehensive international institutions' under which they are placed. Nevertheless, Mr. Green has produced a modern casebook, which is thorough and comprehensive of Anglo-American decisions, the decisions and opinions of the Hague Court and of the principal cases of arbitration.

BOOKS AND PERIODICALS RECEIVED

(*Mention in this list does not preclude later review*)

Books :—

Crimes Against International Law. J. B. Keenan and Brendan Brown. Washington, D.C. : Public Affairs Press. x and 326 pp. $3.25.

The Open Road to Freedom. Lionel Curtis. Oxford: Blackwell. 1950. viii and 78 pp.

Legal Aid. Eric Sachs, K.C. London: Eyre and Spottiswoode. 1951. xxiv and 466 pp. 36s.

A Simple Explanation of the Legal Aid Scheme. Daily Express Legal Guides, No. 1. 56 pp. 2s.

United Kingdom Administration and International Organisations. London : R.I.I.A. 1951. 55 pp. 4s.

These Rights and Freedoms. U.N. Department of Public Information. 1950. iii and 214 pp.

Der Völkerrechtliche Schutz der Berölkerung eines besetzten Gebiets gegen Massnahmen der Okkupationsmacht. O. M. UHLER. Zürich: Polygraphischer Verlag. 1950. xx and 301 pp. S.Frcs.8.

Verbindlichkeit und Konstruktion des Positiven Völkerrechts. D. S. CONSTANTOPOULOS. Hamburg: Rechtsund Staatswissenschaftlicher Verlag. 1948. xvi and 229 pp.

Projet d'un Code Européen de Droit International Privé. ERNST FRANKENSTEIN. Bibliotheca Visseriana XVI. 1950. xv and 185 pp. 12 gld.

PERIODICALS :—

Modern Law Review. Vol. 14, No. 2. April, 1951.

International Income Tax Law Journal. April, 1950. (Delhi.)

South African Law Journal. January, 1951. (Capetown.)

The Arbitration Journal. 1951, No. 1. (New York.)

Baylor Law Review. Vol. III, No. 2. (Baylor University, Waco, Texas.)

Foreign Affairs. April, 1951. (Washington.)

Revue Certique de Droit International Privé. 1951, No. 1. (Paris.)

Nordisk Tidsskrift for International Ret. 1950, Nos. 1–4. (Oslo.)

Revue de Droit International. 1950, No. 4. (Geneva.)

Revue Hellenique de Droit International. 1949, Nos. 1–4. (Athens.)

Zeitschrift für Ausländisches und Internationales Privatrecht. 1951, No. 2. (Tübingen.)

Bulletin de droit Tchécoslovaque. 1950, No. 4. (Prague.)

Il Diritto Ecclesiastico. 1951, No. 1. (Milan.)

New Yugoslav Law (*Bulletin on Legislation*). 1950, No. 4. (Belgrade.)

Industry and Labour (*Fortnightly Review by ILO Geneva*).

Boletin Juridico Bibliografico. October, 1950. No. 10. (University of Antioquia, Colombia.)

Estridios Derecho. November, 1950. No. 36. (University of Antioquia, Colombia.)

LIST OF DOCUMENTS

A.

INTERNATIONAL COURT OF JUSTICE, COMMUNIQUÉ No. 51/22

On May 26, 1951, the Government of the United Kingdom filed in the Registry of the International Court of Justice an Application instituting proceedings against the Imperial Government of Iran in connection with the application of the Convention dated April 29, 1933, between Iran and the Anglo-Iranian Oil Company.

The United Kingdom Government's submissions are formulated as follows in its Application :

The court is asked :

(a) To declare that the Imperial Government of Iran are under a duty to submit the dispute between themselves and the Anglo-Iranian Oil Company, Limited, to arbitration under the provisions of Article 22 of the Convention concluded on April 29, 1933, between the Imperial Government of Persia and the Anglo-Persian Oil Company, Limited, and to accept and carry out any Award issued as a result of such arbitration.

(b) Alternatively,

(i) To declare that the putting into effect of the Iranian Oil Nationalisation Act of May 1, 1951, in so far as it purports to effect a unilateral annulment, or alteration of the terms, of the Convention concluded on April 29, 1933, between the Imperial Government of Persia and the Anglo-Persian Oil Company, Limited, contrary to Articles 21 and 26 thereof, would be an act contrary to international law for which the Imperial Government of Iran would be internationally responsible;

(ii) To declare that Article 22 of the aforesaid Convention continues to be legally binding on the Imperial Government of Iran and that, by denying to the Anglo-Iranian Oil Company, Limited, the exclusive legal remedy provided in Article 22 of the aforesaid Convention, the Imperial Government have committed a denial of justice contrary to international law;

(iii) To declare that the aforesaid Convention cannot lawfully be annulled, or its terms altered, by the Imperial Government of Iran, otherwise than as the result of agreement with the Anglo-Iranian Oil Company, Limited, or under the conditions provided in Article 26 of the Convention;

(iv) To adjudge that the Imperial Government of Iran should give full satisfaction and indemnity for all acts committed in relation to the Anglo-Iranian Oil Company, Limited, which are contrary to international law of the aforesaid Agreement, and to determine the manner of such satisfaction and indemnity.

The Application was immediately communicated to the Iranian Government.

B.

(*For reasons of space only those Documents are included which appear to be of special interest*)

I. AGREEMENTS

Compensation

Agreement between the Government of the United Kingdom and the Government of the French Republic relating to terms of compensation for British interests in French nationalised gas and electricity undertakings. [Treaty Series 1951/34, April 11, 1951, Cmd. 8224.]

List of Undertakings referred to in Annex 1 of the Agreement. [Treaty Series 1951/35, Cmd. 8227.]

Agreement between the Government of the United Kingdom and the Government of the French Republic relating to Compensation for Disablement or Death due to War Injury suffered by Civilians. [Treaty Series 1951/22, January 23, 1950, Cmd. 8192.]

Finance

Agreement between the Governments of France, the United Kingdom and the United States of America for the submission to arbitration of certain claims to gold looted by the Germans from Rome in 1943. [Treaty Series 1951/39, April 25, 1951, Cmd. 8242.]

Agreement between the Government of the United Kingdom and the Government of Jordan for the settlement of financial matters outstanding as a result of the termination of the Mandate for Palestine. [Treaty Series 1951/41, May 1, 1951, Cmd. 8255.]

Agreement between the Government of the United Kingdom and the Government of the Netherlands for the settlement of conflicting claims to German Enemy Assets in their respective territories. [Treaty Series 1951/31, September 20, 1949, Cmd. 8207.]

Human Rights

Convention for the Protection of Human Rights and Fundamental Freedoms. [Miscellaneous 1951/1, November 4, 1950, Cmd. 8130.]

Social Services

Agreement between the Government of the United Kingdom and the Government of the French Republic regarding the Reciprocal Application of the Social Security Schemes of France and Northern Ireland. [Treaty Series 1951/25, January 28, 1950, Cmd. 8213.]

Convention on Social and Medical Assistance between the Brussels Treaty Powers and Supplementary Agreement to give effect to the Convention. [Treaty Series 1951/33, November 7, 1949, April 17, 1950, Cmd. 8226.]

Convention between the Governments of the United Kingdom, Belgium, France, Luxembourg and the Netherlands to extend and co-ordinate Social Security Schemes in their application to Nationals of the Parties to the Brussels Treaty. [Treaty Series 1951/30, November 7, 1949, Cmd. 8218.]

Tariffs and Trade

Protocol concerning the European Customs Union Study Group. [Miscellaneous 1951/11, December 15, 1950, Cmd. 8247.]

Convention establishing a Customs Co-operation Council. [Miscellaneous 1951/10, December 15, 1950, Cmd. 8246.]

Convention on Nomenclature for the Classification of Goods in Customs Tariffs. [Miscellaneous 1951/8, December 15, 1950, Cmd. 8220.]

Convention on the Valuation of Goods for Customs Purposes. [Miscellaneous 1951/9, December 15, 1950, Cmd. 8245.]

Agreement on the Importation of Educational, Scientific and Cultural Materials. [United Nations 1951/1, November 22, 1950, Cmd. 8171.]

Report on the Torquay Tariff Negotiations, with text of the Torquay Protocol to the General Agreement on Tariffs and Trade. [Cmd. 8228.]

Exchange of Notes between the Government of the United Kingdom and the Government of Yugoslavia granting a credit of £2,000,000 to Yugoslavia for the purchase of raw materials. [Treaty Series 1951/17, January 11, 1951, Cmd. 8172.]

Exchange of Notes between the Government of the United Kingdom and the Government of Yugoslavia granting a credit of £3,000,000 to Yugoslavia for the purchase of consumer goods, foodstuffs, etc. [Treaty Series 1951/12, December 28, 1950, Cmd. 8149.]

Taxation

Exchange of Notes between the Government of the United Kingdom and the Greek Government for the Reciprocal Exemption of Air Transport Profits from Income Tax, etc. [Treaty Series 1951/2, November 16, 1950, Cmd. 8128.]

Agreement between the Government of the United Kingdom and the Norwegian Government for the avoidance of Double Taxation and the prevention of fiscal evasion with respect to taxes on income. [Norway 1951/2, May 2, 1951, Cmd. 8248.]

Miscellaneous

Exchange of Notes between the Government of the United Kingdom and the Government of Ethiopia for the appointment of a Mixed Commission to demarcate the boundary between Kenya and Ethiopia. [Treaty Series 1951/18, July 3, 1950, December 29, 1950, January 2, 1951, Cmd. 8173.]

Exchange of Notes between the Government of the United Kingdom and the Government of Cuba for the Abolition of Visas. [Treaty Series 1951/24, March 2, 1951, Cmd. 8197.]

Consular Convention between the United Kingdom and the Kingdom of Norway. [Norway 1951/3, February 22, 1951, Cmd. 8249.]

II. INTERNATIONAL ORGANISATION

United Nations

United Nations Resolution on Chinese Intervention in Korea. (Speeches of Sir Gladwyn Jebb between January 18 and February 1, 1951, and Statement by the Prime Minister in the House of Commons on February 1, 1951.) [Korea 1951/1, Cmd. 8159.]

International Court of Justice

Agreement between the Government of the United Kingdom and the Government of the French Republic regarding Rights of Fishery in areas of the Ecrehos and Minquiers. [France 1951/2, January 30, 1951, Cmd. 8168.]

Agreement between the Government of the United Kingdom and the Government of the French Republic for the submission to the International Court of Justice of differences concerning sovereignty over the Minquiers and Ecrehos Islets. [France 1951/1, December 29, 1950. Cmd. 8194.]

Renewal by the Government of the United Kingdom of Declaration accepting the jurisdiction of the International Court of Justice concerning the interpretation, application or validity of any treaty relating to the Boundaries of British Honduras. [Miscellaneous 1951/7, February 12, 1951, Cmd. 8206.]

Council of Europe

Report on the proceedings of the Second Session of the Consultative Assembly of the Council of Europe. [Miscellaneous 1951/2, Cmd. 8178.]

International Law Commission

Memorandum concerning a draft code of Offences against the Peace and Security of Mankind. [A/CN.4/39, November 24, 1950.]

Report on Reservations to Multilateral Conventions. [A/CN.4/41, April 6, 1951.]

Second Report on the Law of Treaties : Revised Articles of the Draft Convention. [A/CN.4/43, April 10, 1951.]

Observations of Governments of Member States relating to the formulation of the Nürnberg Principles prepared by the International Law Commission. [A/CN.4/45, April 19, 1951.]

Resolutions of the International Law Association concerning Nationality and Statelessness, The Development and Codification of International Law, and the Illegal Use of Force. [A/1785, March 6, 1951.]

III. STATUTORY INSTRUMENTS

The Maintenance Orders (Facilities for Enforcement) (Yukon Territory) Order, 1951. [No. 146, January 29.]

The Trading with the Enemy (Custodian) Order. [No. 153, January 30.]

The Grenada (Legislative Council) (Electoral Provision) Order in Council, 1951. [No. 328, February 27.]

The Saint Vincent (Legislative Council) (Electoral Provision) Order in Council, 1951. [No. 329, February 27.]

The Dominica (Legislative Council) (Electoral Provisions) Order in Council, 1951. [No. 330, February 27.]

The Maintenance Orders (Facilities for Enforcement) (Nova Scotia) Order, 1951. [No. 429, March 15.]

The East African (Appeal to Privy Council) Order in Council, 1951. [No. 609, April 9.]

The Sierra Leone Protectorate Order in Council, 1951. [No. 610, April 9.]

The Sierra Leone (Legislative Council) Order in Council, 1951. [No. 611, April 9.]

The Nigeria (Electoral Provision) Order in Council, 1951. [No. 612, April 9.]

The Tanganyika (Companies Dominion Register) Order in Council, 1951. [No. 752, April 28.]

The Trading with the Enemy (Custodian) (No. 2) Order, 1951. [No. 779, May 2.]

The Trading with the Enemy (Custodian) (No. 3) Order, 1951. [No. 780, May 2.]